APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1668

BRENDA CHILCUTT, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

RANDELL P. MEANS, in his individual capacity,
Appellant,

Appeal from the United States District Court
for the Northern District of Texas

Oct. 25, 1993

Before JOHNSON, JOLLY, and JONES, Circuit Judges.

JOHNSON, Circuit Judge:

When the defendant, United States of America, failed to properly respond to the plaintiffs' discovery requests in the case *sub judice*, the district court ordered the Government to produce previously requested documents and respond to unanswered interrogatories. The court also ordered the Assistant United States Attorney ("AUSA"), Mr. Randell Means, to personally reimburse the plaintiffs

for attorney's fees which arose from the Government's discovery abuse. When the Government disobeyed the district court's order to fulfill its discovery obligations and attempted to deceive the court and the plaintiffs into believing that certain documents properly requested either did not exist or were not requested, the district court, exercising authority granted in Rule 37 of the Federal Rules of Civil Procedure, deemed that the liability facts of the plaintiffs' case were established for the purposes of the case. The Government and Mr. Means aver that the district court abused its discretion in sanctioning them. We disagree and therefore affirm.

I. Facts and Procedural History

On October 4, 1988, Brenda Chilcutt Wortham,[1] performing her duties as an employee of Chrysler First, Inc., visited the River Bend Post Office in Fort Worth, Texas, to pick up the company's mail. Soon after she entered the post office, she slipped and fell. The fall resulted in serious injuries which required Ms. Wortham to undergo several major surgeries and extensive medical care. Ms. Wortham's workers' compensation carrier, Home Indemnity Company ("HIC"), alleged that governmental negligence had caused Ms. Wortham's fall. HIC therefore filed an administrative claim with the United States Postal Service ("USPS") in August 1990, seeking reimbursement for monies paid Ms. Wortham for her work-related injury. Ms. Wortham filed a similar claim in October of the same year. The USPS denied both claims.

Ms. Wortham and HIC later commenced this action in the Northern District of Texas, suing under the Federal Torts Claims Act. In its initial scheduling order, filed on July 17, 1991, the district court stated that "[s]hould any party or counsel fail to cooperate in doing anything

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[1] The plaintiff married after the initiation of this action. The Court will therefore use her present name—Brenda Wortham—in this opinion.

required by this order to be done, such party or counsel or both will be subject to sanctions, including dismissal or entry of default without further notice." R. at 26. In the court's memorandum attached to the scheduling order, entitled "Special Pretrial Instructions," the court informed the parties that it expected counsel for each party to cooperate fully in the discovery process. The court further warned that it would not tolerate discovery abuses, stating that "[u]nnecessary discovery or unreasonable delay may subject the infracting party to sanctions and the payment of costs." R. at 28. The court admonished the parties in the same manner in revised scheduling orders which were filed on February 27, 1992, and March 9, 1992.[2]

On March 24, 1992, Ms. Wortham served interrogatories and requests for production of documents and things on Randell Means, the AUSA in charge of the case.[3] In early April, she reiterated her request for many of the documents and things in subpoenas duces tecum. Although the Government produced some of the requested items for depositions, it did not answer or object to the requests for production or the interrogatories. Counsel for Ms. Wortham, Ms. Kelly Robbins, talked with Mr. Means several times by telephone and in person, both before and after the answers were due. She informed him that time was of the essence and reminded him that the discovery cut-off date was May 8. During each discussion, Mr. Means informed Ms. Robbins that he was preparing responses to the discovery requests and assured her that the answers were forthcoming. In reality, the answers were not forthcoming; Ms. Robbins' efforts to extract answers from Mr. Means were of no avail.

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[2] In the latter scheduling order, the court extended the discovery cut-off date to May 8, 1992, and scheduled the trial for the week of June 8, 1992.

[3] The Federal Rules of Civil Procedure required that the Government respond no later than April 23, 1992. FED.R.CIV.P. 33(a) and 34(b).

On May 19, 1992, twenty-six days after the Government's discovery answers were due, Ms. Robbins filed a motion to compel and a motion for sanctions. The district court scheduled a hearing on those motions for May 22. Mr. Means served Ms. Robbins with answers to some of the interrogatories and objected to others the morning of the hearing. However, at the hearing Ms. Robbins complained, not only about the tardiness of the recently-supplied answers and objections, but she also asserted that a number of the answers to the interrogatories were incomplete.[4] Further, although Mr. Means provided some important documents in response to the requests for production on the morning prior to the hearing,[5] he failed to produce other requested documents. In his answers to the production requests and again at the hearing, Mr. Means averred that at least half of the requested documents did not exist. One such document was an accident log which the plaintiffs claimed Mr. Svede, the Fort Worth USPS accident investigator and the Government's representative for this action, main-

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[4] The Government answered a number of the interrogatories by stating that it did not possess the information requested. For example, Mr. Means testified at the hearing that the janitorial contractor, Ms. Marilyn Chapman, knew the answers to four of the interrogatories. However, Mr. Means had never attempted to contact Ms. Chapman prior to the hearing to get the information. In fact, although Means possessed Ms. Chapman's address, he had never looked up her telephone number in the directory to call her. Further, although Ms. Chapman, who was not a hostile witness to the Government, worked at the post-office each day, Mr. Means had never visited the post office during her work hours to question her.

[5] The documents showed that other people had fallen at other post office locations. Because the same contractor cleaned all of the post offices in the Fort Worth area and used the same type of wax on all of the floors, this information was quite beneficial to the plaintiffs, who claimed, among other things, that the post office floor was excessively slick.

tained.[6] Another was a standard accident report ("Form 1769").

The district court, reviewing these and other discovery infractions, refused to grant the plaintiffs a default judgment. He determined that such a penalty was too harsh under the circumstances before him.[7] Nonetheless, finding that the Government's conduct was not substantially justified and that no circumstances existed which made sanctions inappropriate, the court concluded that a lesser sanction was, indeed, appropriate. The court first ordered the Government to deliver every document called for by the plaintiffs' requests for production to Ms. Robbins' office by May 27. The court directed Mr. Means to attach an affidavit to his responses to the discovery requests certifying that he, Mr. Means, had made inquiries which were calculated to disclose the existence of any document or tangible thing for which the production requests or subpoenas duces tecum called.[8] Additionally,

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[6] This log apparently contained information about remedial actions taken by the USPS in response to Ms. Wortham's accident, as well as information on other accidents which occurred at the River Bend location.

[7] However, he added that he would not rule "out the possibility of there being a default judgment on liability, and perhaps even on damages, if the government continue[d] the course of conduct" in which it had been engaging. Tr. Vol. 3 at 37.

[8] In his response to the requests for production, Mr. Means listed the name of each person he had contacted to assist in his search for pertinent documents. As required by the court, Mr. Means also attached an affidavit to the response, certifying the following:

> Every item responsive to plaintiff's discovery requests has been produced and is listed in this affidavit. I do further certify that I have made inquiries of such a nature as to be calculated to disclose the existence of any item of any kind or character called for by any of plaintiff's discovery requests. I do further certify that the person listed with each enumerated response after the title *"Contact:"* constitutes the persons contacted by me with regard to ascertaining the existence of and locating

the court ordered the Government to produce Ms. Chapman for a deposition on May 28 since the Government had failed to question her. Further, based upon the authority provided under Rule 37(d), the court ordered Mr. Means to pay for those deposition costs and all of the attorney's fees and other expenses the plaintiffs had incurred in preparing the motion to compel and the motion for sanctions. The court stated that these sanctions were against the attorney, not against the United States, and forbade Mr. Means from seeking reimbursement from the Government.[9] The court also informed Ms. Robbins that after she reviewed the Government's recently provided responses to her discovery requests, she could file supplemental motions to compel and for sanctions if she so needed.

She did so. Among other things, she complained in her supplemental motions of the Government's failure to produce the Form 1769 and Mr. Svede's accident log. With respect to the latter, Ms. Robbins specifically pointed out that "Al Svede testified in his deposition (at page 114, line 16) that he keeps a log which, among other things, would contain information relating to types of claims and their disposition. Defendant has never produced this log." R. at 239.

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items responsive to plaintiffs' requests. I do further certify that the response there indicated represents the substance of the response of each such person to the inquiries made by me.

I do hereby declare under penalty of perjury that the foregoing is true and correct.

R. at 181. As to the requests which called for Mr. Svede's accident log, Mr. Means stated in his response that Mr. Svede had been his contact person.

[9] The Government filed an interlocutory appeal, asking this Court to review the district court's decision to sanction Mr. Means. However, because that court had not yet entered final judgment, we dismissed for lack of appellate jurisdiction.

Mr. Means responded to a large number, but not all, of Ms. Robbins' allegations.[10] Important for our purposes, Mr. Means stated that he had produced the only accident log that was responsive to the plaintiffs' production requests.[11] The hearing on this supplemental motion for sanctions occurred on Thursday, June 4, 1992, just four days—only one working day—prior to the scheduled trial. During that hearing, Mr. Means again claimed that although Mr. Svede possessed an accident log, it was not covered by the plaintiffs' requests for production.[12] Mr. Means again testified that no Form 1769 ex-

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[10] He stated that on May 29 he learned that he had previously provided incorrect information on the supplier of the floor wax. Mr. Means also asserted that he had "discovered" the existence of some documents which he had previously claimed were nonexistent.

[11] More specifically, Mr. Means constated:

> *Plaintiff further complains that Al Svede has not produced his own log* relating to the same topic. *Defendant has certified, based upon the answer provided by Al Svede, that there is no record of any complaint of the type sought by Plaintiff's request.* There being no information of the type sought, as established by a *complete search* of the proper records of Defendant and the certified answer of Defendant, there is no violation of this Court's orders shown.

R. at 346. (Emphasis added).

[12] In their requests for production, the plaintiffs limited all inquiries to the River Bend Post Office location. At this June 4 hearing, Means stated that he had checked the log in question. He asserted, however, that the log contained no information on accidents which occurred at the River Bend location. The following transpired:

> THE COURT: Well, why haven't those accident logs been produced?
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> MR. MEANS: Your Honor, as our motion sets out, the request related specifically to anything that dealt with these premises. A search has been conducted of those accident logs, as we have set out in our response to this supplemental motion,

isted, claiming, "As I understand, the plaintiff says she filled that out and gave it to the witness on that date. Our position is that did not happen." Tr. Vol. 5 at 57.

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and there is no record in those logs relating to any accident or complaint on the premises of River Bend for the time—

THE COURT: Well, that takes care of it. That's what she has asked for.

And if you can at some point in time prove they misrepresented to you in saying that there is nothing, then they have got a different problem. But so far the representation is that there is nothing.

MS. ROBBINS: Well, Your Honor, we do know of two accidents that occurred at that premises, and they would be listed in that log.

THE COURT: Well, I have got to assume they don't do a very good job of keeping their records because *it's been represented that there is no record of those accidents. Is that what you are representing?*

MR. MEANS: *That is correct, Your Honor.*

THE COURT: Even though there are two other accidents on the premises, the post office department did not keep a record in any of its logs, accident logs or other books, of those accidents.

MR. MEANS: There is one accident that was reported. That is the Chillcut (sic) accident this case is based on. And my representation is the same as what is reflected here. *Yes, Your Honor, there is no record of that in this log.* She refers to a second accident that occurred, and no further reporting was made. And the document that was filled out at the scene of the River Bend post office and has remained at that location has been produced, and *there is no other notation in the log of that transaction.*

* * * *

MR. MEANS: There is no record. As our response to this supplemental motion states, *I am stating under oath before the court as an officer of the court that my representations in that motion are correct, that a search of that log has been conducted, and no accident has been identified to the time periods in that log—and I believe it's 1987 through the present—for the premises, River Band [post office], for both employee accidents or complaints or customer accidents.*

Tr. Vol. 5 at 48-50 (emphasis added).

Due to the numerous discrepancies between the plaintiffs' claims and the defendant's response, the court directed the Government to bring its witnesses, including Mr. Svede, to the court later on the same day. One of the first questions the court asked Mr. Svede concerned the existence of the Form 1769. Mr. Svede testified under oath that not only did the Form 1769 exist, *but that he possessed a copy of that form.*[13] If that were not bad enough for the Government, when Ms. Robbins asked Mr. Svede whether he had listed Ms. Wortham's accident in his accident log, he answered that he had done so. Mr. Svede presented the log to the court to review, and it did, indeed, list Ms. Wortham's accident, contrary to Mr. Means' earlier statement that it did not.[14]

The court disagreed, finding that several of the requests covered the accident log. The court further found that although the Government and the people working on the case knew that the log existed and that it was called for by the requests for production, the Government chose to withhold the documents in derogation of the discovery rules and the court's order compelling discovery. Finally, the court found that the Government had severely disadvantaged the plaintiffs by producing the documents on the eve of trial and by causing the plaintiffs' counsel to devote a great amount of time, not to preparing for trial, but to dealing with the Government's discovery abuses.

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[13] Mr. Means presented *no* explanation for his misrepresentation regarding Form 1769. In fact, even though Mr. Svede, *the Government's representative,* testified under oath that such a form existed and that he possessed a copy thereof, Mr. Means and the Government—similar to the argument that windmills are dragons—persist in their quixotic claim that the form does not exist. Tr. Vol. 5 at 142; Oral Argument Tape.

[14] *See infra* note 12. Mr. Svede provided no explanation as to the non-production of the log. Mr. Means merely asserted that he did not believe that the log was covered by the requests for production.

Exercising authority under Rules 37(b) and 37(d) of the Rules of Civil Procedure, the court determined that stiff sanctions were appropriate because of the Government's flagrant disregard of its discovery obligations and its flouting the court's order compelling discovery. Although the court believed that a default judgment as to liability or damages was justified, it decided instead merely to deem that the *prima facie* elements of the plaintiffs' liability claim were established for the purposes of the case. The court allowed the Government to present evidence of its affirmative defenses and required the plaintiffs to prove damages. After a bench trial on the Government's affirmative defenses and on damages, the court found for the plaintiffs and awarded them $892,567.00.

Not prone to overlook what appeared to be a "flagrant case of misrepresentation by Mr. Means, as well as a rather flagrant violation of the discovery obligations," the district court held a hearing to determine whether it should hold Mr. Means in criminal contempt of court and bar him from practicing before the Northern District of Texas. Tr. Vol. 3 at 4. During the hearing, the court ignored many of the discovery infractions and focussed solely on Mr. Svede's log. Despite the fact that he had previously referred to the accident log several times, both in his response to Ms. Wortham's supplemental motion for sanctions [15] and in a hearing before the court in which he had affirmed, as an officer of the court, that he had reviewed that particular log,[16] Mr. Means claimed at ***this*** hearing that he had never ***seen*** the log and had not known that it existed prior to the June 4 hearing.

The district court thought otherwise, concluding that he could find that the elements of criminal contempt were proved beyond a reasonable doubt. The court determined that Mr. Means had intentionally misrepresented to the court that Mr. Svede's log did not report Ms. Wortham's

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[15] *See supra* note 11.

[16] *See supra* note 12; *see also supra* note 8.

accident. However, giving Mr. Means the "benefit of the doubt," the court chose not to disbar him or hold him in criminal contempt. Instead, the court ordered Mr. Means to obtain fifteen hours of ethics or professional responsibility training by November 1, 1992. He also dictated that Means not be reimbursed for the training costs and ordered Mr. Means to reimburse Ms. Robbins for the time she had spent in the hearing. The Court again directed that Mr. Means not seek or obtain reimbursement for that sanction.

The Government and Mr. Means are not satisfied in the least bit with the outcome of this case, and they both appeal. The Government argues that the district court abused its discretion in deeming the liability elements of the case established. Mr. Means challenges the court's decision forbidding him from seeking reimbursement from the Government.

II. Discussion

A. *Standard of Review*

Rule 37(b)(2) authorizes courts to appropriately respond to and deal with parties which have disobeyed discovery orders. District courts' discretion in fashioning appropriate sanctions for parties who disobey their orders is quite broad, though not unlimited. *Marshall v. Segona,* 621 F.2d 763, 767 (5th Cir.1980); *Emerick v. Fenick Industries, Inc.,* 539 F.2d 1379, 1381 (5th Cir.1976). Hence, the question we must decide in each of these issues is not whether this Court would have imposed the same sanctions as did the district court; the question is whether the district court abused its discretion in so doing. *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 640, 96 S.Ct. 2778, 2778, 49 L.Ed.2d 747 (1976); *Shipes v. Trinity Indus.,* 987 F.2d 311, 323 (5th Cir.1993).

B. *Establishing Facts Against the Government*

1. Proper Standard

The Government, in its argument that the district court improperly sanctioned it, insists that the sanction in question was tantamount to a default judgment on both liability and damage claims. The Government therefore contends that Rule 37 dismissal and default judgment cases control the facts of this case. *See e.g. Batson v. Neal Spelce Associates, Inc.* 765 F.2d 511 (5th Cir.1985); *Marshall v. Segona,* 621 F.2d 763 (5th Cir.1980); *Emerick v. Fenick Industries, Inc.,* 539 F.2d 1379 (5th Cir. 1976). While it is true that a court's decision to deem certain facts established may equate to a default judgment in some circumstances, *see Marshall,* 621 F.2d at 766 n. 3, such is not the case here.[17]

The district court allowed the Government to present its case in chief on its affirmative defense issue. The Government did so: it called three witnesses to attempt to prove that Brenda Wortham's negligence, not that of the Government, had caused the accident. Because the court's ruling did not preclude the Government from presenting its case in chief, the sanction was a far cry from a default judgment.[18] Further, the Government's assertion that the court also granted a default judgment on the damages issues is all but fanciful. Not only did the court require Ms. Wortham to prove damages, but on many of the

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[17] We note that deeming the establishment of certain facts is one of the least harsh sanctions available to courts under Rule 37(b). Indeed, it is only more severe than the granting of expenses and attorneys' fees. *See* FED.R.CIV.P. 37(b)(2); *see also United States v. Sumitomo Marine and Fire Ins. Co.,* 617 F.2d 1365, 1369 (9th Cir.1980).

[18] Clearly, had the Government proved its case by a preponderance of the evidence, the fact that the liability elements had been deemed established would have been nugatory, and the Government would have been victorious in this litigation.

damage elements, the court made conclusions which were very favorable to the Government.

Thus, we believe that the default-judgment/dismissal cases proffered by the Government impose too great a standard for the type of sanction involved here. Rather than look to those types of cases, we believe that the Supreme Court's decision in *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), governs this case.

There, the Compagnie Des Bauxites de Guinee ("CBG") filed suit in a Pennsylvania district court against its insurance companies. Several of the companies ("excess insurers"), including the Insurance Corporation of Ireland, filed motions for summary judgment based upon their contention that the Pennsylvania court lacked personal jurisdiction over them. CBG sought discovery on the personal jurisdiction issue; however, the excess insurers, though ordered and later threatened with sanctions, failed to make a conscientious effort to comply with the discovery orders. The district court therefore carried through on its threatened sanctions and determined that the excess insurers were subject to the in personam jurisdiction of the court for the purposes of the litigation. *Insurance Corp. of Ireland*, 456 U.S. at 697, 102 S.Ct. at 2101.

The Supreme Court, affirming the ruling of the district court, determined that decisions to impose sanctions under Rule 37(b) must be guided by two important considerations: The sanction must first of all be just, and it must "specifically relate[] to the particular 'claim' which was at issue in the order to provide discovery." *Id.* at 707, 102 S.Ct. at 2107. The Court found several significant facts which contributed to its decision that the sanction was fair. First, the district court had warned the excess insurers on several occasions that continued delay and disregard of its orders would result in the imposi-

tion of sanctions. The Court also found that the excess insurers' repeated promises to comply with discovery orders was supportive of the district court's decision. Finally, the Court concluded that the allegation of personal jurisdiction was not frivolous and that CBG's attempt to use discovery to prove that personal jurisdiction existed was not a misuse of the judicial process. *Id.* at 707-708, 102 S.Ct. at 2106-2107.

Because the discovery in issue targeted personal-jurisdiction evidence, the Court had no problem in finding that the deemed finding—personal jurisdiction—was sufficiently related to the claim sought to be proved by discovery. *Id.* at 708-709, 102 S.Ct. at 2107. The Court therefore found that the district court did not abuse its discretion in sanctioning the excess insurers. *Id.*

We believe that the two standards presented in *Insurance Corp. of Ireland*—fairness and substantial relationship between the sanction and the claim—along with a third—that the sanction meet the Rule 37 goals of punishing the party which has obstructed discovery and deterring others who would otherwise be inclined to pursue similar behavior, *National Hockey League,* 427 U.S. at 643, 96 S.Ct. at 2781—should guide our review of the district court's decision in the case *sub judice.*

2. Just and Fair?

a. Ample Warning

This case resembles *Insurance Corp. of Ireland* in several key respects. First, as occurred in that case, the district court here warned the parties many times that it would not tolerate discovery abuses. *See Bluitt v. ARCO Chemical Co.,* 777 F.2d 188, 191 (5th Cir.1985) (affirming the dismissal of a case where the district court found that the plaintiff's failure to obey discovery orders and heed warnings that dismissal would occur unless the plaintiff performed its discovery obligations showed that

a sanction lesser than dismissal would have been of no avail).

In the instant case, the parties were warned in each of three scheduling orders, as well as in each of the memoranda which accompanied those orders, that discovery violations could result in dismissal or default judgment. Further, in the first hearing on Ms. Wortham's motion to compel, the district court, declining to grant a default judgment, specifically explicated that default judgment on liability and perhaps on damages might be justified if the Government continued in the type of conduct in which it was engaging.[19] Further, during the hearing on the second motion to compel, the district court warned that if the plaintiffs could prove that the Government had falsely stated that the log contained no information on accidents which occurred at the River Bend location, the Government would have a problem.[20]

Having been warned numerous times that discovery abuses in general and that the continuation of its conduct in particular might result in a default judgment, the Government should not have been surprised by the district court's decision to deem the liability facts established. In fact, based upon the Government's flagrant violations of its discovery obligations, its flouting the district court's discovery order, and its blatant misrepresentation to the court, the Government should have been relieved that the court did not order a much stiffer penalty.

b. Empty Promises

This case is also similar to *Insurance Corp. of Ireland* in that the Government here, like the excess insurers there, repeatedly promised to comply with its discovery obligations. Ms. Robbins, the plaintiff's counsel, testified

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[19] *See supra* note 7.

[20] *See supra* note 12.

that she communicated with Mr. Means numerous times, both face to face and by telephone, before and after the Government's answers were due, explaining to him that time was of the essence and reminding him of the discovery cut-off date. Even according to Mr. Means, each time he and Ms. Robbins talked, he promised that the answers would be forthcoming.

Without a doubt, those promises strung Ms. Robbins along, causing her to incorrectly believe that seeking an order compelling discovery or moving for Rule 37 sanctions was unnecessary. Ms. Robbins believed the Government's promises until it was nearly too late for her to adequately prepare her case. Had the Government simply refused to perform its discovery obligations without giving vain assurances of its alleged intent to comply, Ms. Robbins would almost certainly have sought an order to compel much earlier than she did. We view the Government's unfulfilled promises as the Supreme Court viewed the excess insurers' pledges to comply with CBG's discovery requests: They support the district court's decision to impose sanctions.

c. Frivolity of the Claim

The Government has never contended that the plaintiffs' use of discovery was an abuse of judicial process. The plaintiffs had a colorable claim that the Government's negligence caused Ms. Wortham's accident. The Government conceded that only five of eight light fixtures were functioning on the day of the accident. More importantly, the concealed log proved that numerous other customers had likewise fallen at the River Bend Post Office.[21] The plaintiffs' claim of liability was far from frivolous.

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[21] The district court stated that the only reason the Government would withhold Mr. Svede's accident log and then make misrepresentations as to the log's contents was to prevent the plaintiffs from learning that a number of other customers had also fallen at the River Bend location.

d. Other Considerations

1. Intentional Misconduct

The Government asserts that there is no evidence of willful or contumacious behavior in this case. It therefore claims that the district court's sanction was unjust.[22] We disagree. As discussed earlier, the sanction granted here was not tantamount to a default judgment, and this Court has never held that willful or contumacious conduct is a prerequisite to sanctions which are less harsh than a dismissal or default judgment.

Regardless of the proper *mens rea* standard however,[23] the credible evidence in the record of this case reveals

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[22] This Court, and the Supreme Court, as well, have often forbidden the dismissal of a case if the conduct involved was not willful or contumacious. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 1095, 2 L.Ed.2d 1255 (1958); *Bluitt v. Arco Chemical Co.*, 777 F.2d at 190-91; *Batson*, 765 F.2d at 514.

[23] Because we conclude that the Government indeed flagrantly and willfully disregarded its discovery obligations and the district court's order, we need not determine what lesser standard of behavior would have justified the type of sanction ordered in this case.

We note, however, that Rule 37(b) clearly indicates that district courts have authority to grant a broad spectrum of sanctions. Of course, the flagrancy of a party's behavior must be directly proportionate to the severity of the sanction imposed. Nonetheless, neither this Court nor the Supreme Court has ever determined that the lack of willful, contumacious, or prolonged misconduct prohibits all sanctions. On the contrary, we have held that dismissal or default judgment is *warranted* only when misconduct is quite serious.

The Supreme Court made clear in *Rogers*, a case in which the petitioners were absolutely precluded by foreign law from turning over certain documents to the respondents, that though the petitioners were *unable* to comply with the discovery requests, the district court still had broad discretion to mete out a lesser sanction than dismissal. *Rogers*, 357 U.S. at 213, 78 S.Ct. at 1096 (stating that "[i]t may be that in the absence of complete disclosure by

quite readily that the Government not only intentionally withheld documents that it knew existed, but it also knowingly made blatant misrepresentations to the district court about the existence of those documents.[24] Such conduct, in our view is patently willful and contumacious. Indeed, the district court considered Mr. Means' behavior to be *so* willful and contumacious that it seriously considered disbarring Mr. Means and holding him in criminal contempt. The punishment meted out here clearly fit the conduct involved.

2. It's Not Our Fault

The Government further claims that it was an innocent client and that the district court unfairly punished it for the errors of its attorney, Mr. Means. This Court has often emphasized that an innocent party should not be severely penalized for the misconduct of its counsel. *Batson*, 765 F.2d at 514; *Marshall*, 621 F.2d at 768; *Factory Air Conditioning Corp. v. Westside Toyota, Inc.*, 579 F.2d 334, 337 (5th Cir.1978). However, the district court did not punish the Government for misconduct solely attributable to the Government's attorney. The court concluded that there was "no question but [t]hat

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petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events").

Significantly, the Court explained that the type of conduct displayed by a party had no bearing on *whether* sanctions should be imposed, but only on the *type* of sanctions imposed. The Supreme Court explained, "[T]he willfulness or good faith of [a party], can hardly affect the fact of noncompliance and [is] relevant *only* to the path which the District Court might follow in dealing with [the party's] failure to comply." *Id.* at 208, 78 S.Ct. at 1094 (emphasis added). Hence, we simply note that willfulness is not required for deeming that certain facts are established for the purposes of a case unless that sanction is the equivalent of a dismissal or default judgment.

[24] This Court has noted, but chooses not to write on, numerous other discovery violations committed by the Government, as reflected in the record of this case.

[the accident log] was called for by the requests for production and was obviously known *to people that were working on the case on behalf of defendant.*" Tr. Vol. 5 at 148. The key people who worked on the case were Mr. Means, the Government's attorney, and Mr. Svede, the Government's representative.

There is ample evidence in the record to support the district court's conclusion that Mr. Svede also engaged in misconduct. During Mr. Svede's deposition, Ms. Robbins referred him to each request for production and asked him what documents were responsive thereto. Mr. Svede responded that he possessed an accident log which was called for by at least one of the requests. Mr. Means testified that after the deposition, he went over the production requests with Mr. Svede numerous times to obtain his assistance in responding to the requests.[25] However, at the show-cause hearing, Mr. Svede claimed for the first time to have forgotten that the log, which was still in use, existed.

Mr. Svede's testimony, when considered alone, is incredible. Moreover, his testimony is contrary to Mr. Means' earlier testimony. As noted in section I of this opinion, Means stated as an officer of the court that he had reviewed Mr. Swede's log and had determined that it was not responsive to the plaintiffs' requests for production.[26] Despite these inconsistencies, however, the Government continues to ask this Court to believe that Mr. Svede, the Fort Worth USPS accident investigator, responsible for listing every accident in his own accident log which was kept in his own office, forgot that the log existed. It asks that we accept as true the "fact" that Mr. Svede could remember his log under the stressful conditions of a deposition, but could not remember that same log when he later reviewed the requests for production with Mr. Means.

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[25] *See, e.g., supra* note 8.

[26] *See supra* note 12.

We cannot accept the Government's ludicrous assertion that Mr. Svede was totally removed from the misconduct here. The district court's finding is amply supported by the evidence. We fail to see the injustice in sanctioning the Government for the misconduct of its representative in this case.[27]

3. Previous Sanctions

Highly supportive of the district court's decision to deem that the liability facts were established in this case is the fact that that court had previously sanctioned Mr. Means for discovery abuses. One would think that a $2500 sanction granted personally against the Government's attorney would have been warning enough that the district court would not tolerate any further discovery abuses. Since such was not the case, the district court was well within its discretion to grant the harsher sanction.[28]

Nevertheless, the Government complains that the district court should not have jumped to the sanction it chose, but should have granted a less harsh sanction instead. In the Government's view, only after disobeying the order compelling discovery *after* the imposition of a *second*, less-harsh sanction should it have been punished as severely as it was punished. This argument is without merit.

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[27] We have previously held that the misconduct of an attorney who has been continuously employed by a party supports the imposition of a default judgment against that party. *United States v. Shipco General, Inc.*, 814 F.2d 1011, 1014 (5th Cir.1987). There is no question but that Mr. Means, a Department of Justice attorney, was continuously employed by defendant United States in this case.

[28] In *United States v. Shipco General, Inc.*, the district court initially sanctioned Shipco $500 for ignoring its discovery obligations and the court's order compelling discovery. Because that sanction failed to coerce compliance on the part of Shipco, the district court dismissed Shipco's claims against the United States. We affirmed. 814 F.2d 1011 (5th Cir.1987).

Attorneys are professionals. They are, in every respect, officers of the court, and officers of the court must comply with each court order when it is issued—not after two or three warnings to do so and not after lesser sanctions are imposed. "It [should be] universally understood that a court's orders are not to be willfully ignored, and, certainly, attorneys are presumed to know that refusal to comply will subject them and their clients to sanctions." *Batson*, 765 F.2d at 515.

We conclude that the sanction granted against the Government was fair.

3. Related to the Claim Sought to be Proved by Discovery

The district court determined that the only reason the Government withheld the accident log was to prevent the plaintiffs from learning that a number of other customers had also fallen in the River Bend Post Office. Had the Government properly responded to the subpoenas duces tecum and requests for production, the plaintiffs would have been able to investigate those accidents and would likely have strengthened their liability allegations against the Government. Obviously, the Government's misconduct precluded that from happening.

When parties present no valid objections to discovery and intentionally withhold properly requested information, courts have the authority to presume that the party's refusal to produce the information is "an admission of the want of merit in the asserted defense." [29] *Hammond*,

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[29] The Supreme Court explicated:

> [B]eyond peradventure, the general course of legislation and judicial decision in the several states indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by the legislative authority, and, for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the

212 U.S. at 351, 29 S.Ct. at 380; *see also Insurance Corp. of Ireland,* 456 U.S. at 709, 102 S.Ct. at 2107. Based upon the facts of this case, we believe that the district court was well within its discretion to presume, for the purposes of this case, that the plaintiffs' liability claims were established.

4. Punishment and Deterrence

The Government argues that for such a relatively minor infraction, the district court should have granted a continuance rather than imposing the type of sanctions at issue in this case.[30] First, it must be clear that unless compelling reasons exist, this Court will not require a district court to inconvenience itself by rearranging its calendar to accommodate a malefactor who has violated its discovery obligations. *See Geiserman v. MacDonald,* 893 F.2d 787, 791-92 (5th Cir.1990).

Second, the Government's argument that its conduct was relatively minor and due solely to miscommunication and confusion makes it patent that the Government has yet to recognize that its conduct constituted serious infractions against the rules of discovery as well as against the district court, itself. Far from being relatively minor infractions, the Government's conduct, as discussed above, was willful, contumacious, and flagrant. Unfortunately,

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party refusing, justifying the rendering of a judgment by default, as if no answer had been filed.

Hammond Packing Co. v. Arkansas, 212 U.S. 322, 352, 29 S.Ct. 370, 380-81, 53 L.Ed. 530 (1909).

[30] The Government additionally complains that it should not have been sanctioned because the plaintiffs were not prejudiced by its discovery abuses. While perhaps relevant to the type of sanction imposed, a party need not always be prejudiced by its opponent's discovery abuses prior to the imposition of sanctions. After all, the goal of sanctioning is not to reward the complying party, but to punish the infracting party and to deter others who may be want to engage in similar behavior. *See National Hockey League,* 427 U.S. at 643, 96 S.Ct. at 2781.

the sting of the punishment imposed here failed to bring home to the Government that its actions in this case fell far below that which is acceptable. The Government's lack of concern about the behavior of its counsel and representative clearly demonstrates that it deserved the type of sanctions meted out here. However, even if the Government were to become penitent for its behavior, we do not believe that a lesser sanction would serve the deterrent purposes of Rule 37. *See National Hockey League*, 427 U.S. at 643, 96 S.Ct. at 2781 (concluding that if the Supreme Court reversed the district court's decision to dismiss the case under Rule 37, "it might well be that [petitioner] would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts").

For the above stated reasons we affirm the district court's decision to deem the liability facts as established for the purposes of this case.

C. Propriety of Sanctioning Mr. Means

Although Mr. Means does not argue that the district court abused its discretion in sanctioning him, he does contend that by forbidding him from seeking reimbursement from the U.S. Government, the district court violated the separation of powers doctrine. Mr. Means asserts that as a member of the executive branch, and, more specifically, the Justice Department, the Attorney General—and not a member of the judiciary—is to discipline him.[31]

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[31] Mr. Means also refers the Court to regulations which allow the Justice Department to reimburse employees who have been sued in their individual capacities. Our review of those regulations, however, fails to reveal that they are inconsistent with the district court's decision here. The relevant section is entitled "Representa-

Congress has made it abundantly clear that it intends for Government attorneys to be treated the same as private attorneys. Amending 28 U.S.C. section 2412 in the Equal Access to Justice Act ("EAJA"), Congress determined that the Government should be held liable for attorney's fees and expenses "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b). The House Committee on the Judiciary explained that the change in section 2412, which took effect in October 1981, simply "reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties." HOUSE COMM. ON THE JUDICIARY, EQUAL ACCESS TO JUSTICE ACT, H.REP. NO. 96-1418. 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4984, 4987, 4996. Moreover, the EAJA specifically deleted subsection (f) of Rule 37,[32] which had precluded courts from imposing discovery

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tion of Federal officials and employees by Department of Justice attorneys or by private counsel furnished by the Department in civil, criminal, and congressional proceedings in which Federal employees are sued, subpoenaed, or charged in their individual capacities." 28 C.F.R. § 50.15 (1992). Subsection (c)(1) provides that the "Department of Justice may indemnify the defendant Department of Justice employee for any verdict, judgment, or other monetary award which is rendered against such employee . . ." *Id.* at § 50.15(c)(1).

This language is inapplicable in the situation before us: The regulation evinces no intent whatever to restrict a court's authority to impose sanctions against government employees. Even if an inconsistency existed, however, the Federal Regulations, which do *not* have the force of a federal statute, would have to bow to the Federal Rules of Civil Procedure, which do. *See Sibbach v. Wilson and Co.*, 312 U.S. 1, 13, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1941).

[32] Subsection (f) provided: "EXPENSES AGAINST UNITED STATES. Except to the extent permitted by statutes, expenses and fees may not be awarded against the United States under this rule." *See* 4A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 37.01[11] (2d Ed.1992).

sanctions on the United States.[33] Equal Access to Justice Act, Pub.L. No. 96-481, § 205; *see also* 1980 U.S.C.C.A.N. at 4998.

By taking away the Government's protection from Rule 37 sanctions, Congress could not have been clearer in revealing its intent to subject the Government and its attorneys to Rule 37(b)(2)(E) which provides that, except in circumstances not at issue in this case, district courts are to order the recalcitrant party, the attorney, *or both,* to pay reasonable expenses, including attorney fees, to the opposing party for violations of discovery orders.[34]

There is no question but that a court can forbid a private attorney from seeking reimbursement from clients or employers under Rule 37. *See Shipes*, 987 F.2d at 323 ("Under Rule 37(b), [the attorney] may be personally liable for reasonable expenses, including attorneys' fees, caused by his failure to comply with a discovery order."); *Derechin v. State University of New York*, 963 F.2d 513 (2d Cir.1992) (upholding a district court's decision to forbid a state-employed attorney from seeking reimbursement from the state). In fact, the Supreme Court, construing Rule 11, determined that the punishment and deterrent effects of sanctions are *maximized* when awarded against the attorney personally:

> The purpose of the provision in question [which empowers courts to sanction persons or entities for the

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[33] Interestingly, the committee stated that it believed the EAJA would "make the United States proceed more cautiously" in judicial and administrative proceedings. 1980 U.S.C.C.A.N. at 4999.

[34] The rule reads:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. FED.R.CIV.P. 37(b)(2)(E).

> signing of frivolous documents], however, is not reimbursement, but "sanction," and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. It is at least arguable that *these purposes* are better served by a provision which makes clear that, just as the court expects the signer personally—and not some nameless person within his law firm—to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him personally—and not his law firm—its retribution for failing in that responsibility. The message thereby conveyed to the attorney, [is] that this is not a "team effort" but in the last analysis [is] *yours alone*. . . . Moreover, . . . there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him, and not divert part of it to a partnership . . ."

Pavelic and LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126, 110 S.Ct. 456, 460, 107 L.Ed.2d 438 (1989) (emphasis in original).

We believe the reasoning in *Pavelic and LeFlore* holds true for Rule 37 sanctions. The district court's decision to prevent Mr. Means from seeking reimbursement was not inconsistent with the goals of Rule 37.[35]

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[35] *Blue v. United States Department of the Army* is inapposite to the facts of this case. There, the district court forbade the NAACP from reimbursing one of the attorneys who had been sanctioned, reasoning that NAACP members should not have to pay for the transgressions of the attorney. 914 F.2d 525, 549 (4th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 1580, 113 L.Ed.2d 645 (1991). Unlike this case, the NAACP was not involved *in any way* with the litigation in *Blue*. It was not a party, and it did not supply the attorney. The Fourth Circuit reversed, concluding that the district court had no authority to tell the NAACP, an entity which was not involved in the case, how *not* to expend its monies.

While it is certainly true that the district court in the case *sub judice* commented that taxpayers should not be penalized for

That Congress has allowed federal courts to sanction Government attorneys in the same manner that those courts sanction private attorneys does not answer Mr. Means' contention that such a rule is violative of the separation of powers doctrine. It goes without saying that any rule which violates the Constitution, even if authorized by federal statutes, must be struck down. However, we believe that such is not the case here.

Contrary to Mr. Means' contention that the district court's decision violated the separation of powers doctrine, we believe that to *restrict* a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch,[36] would violate the separation of powers doctrine.[37] Such a decision would invite members of our

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the misconduct of Mr. Means, the record in this case shows all too clearly that, unlike the district court in *Blue*, this district court's primary reason in precluding Mr. Means—who *was* at all times involved in this litigation—from seeking reimbursement was to punish Mr. Means for his flagrant disregard of his discovery obligations. Such a reason for imposing sanctions is entirely appropriate. *National Hockey League*, 427 U.S. at 643, 96 S.Ct. at 2781; *See Derechin v. State University of New York*, 963 F.2d 513 (2d Cir.1992) (upholding district court's decision to prohibit state attorney from seeking reimbursement).

[36] Governmental attorneys should model the ideals of integrity and ethics rather than attempt to circumvent them. *See Perry v. Golub*, 74 F.R.D. 360, 366 (N.D.Ala.1976) (asserting that public interest dictates that the Government, more than any other entity, comply with court orders).

[37] The Government contends that prohibiting Government attorneys from seeking and receiving reimbursement may inhibit such attorneys from vigorously representing the Government and espousing unpopular, yet necessary, legal positions. This "chilling" argument has no more force when invoked by the Justice Department than when invoked by opponents of Rule 11 of the Federal Rules of Civil Procedure. As long as district courts use their sanction authority carefully, no such effects will occur. In any event, appellate review will, in appropriate cases, deter excessive or unwarranted sanctions by the district courts.

sister branches to ignore acceptable standards of decorum in courts and flout court orders. Indeed, to rule as Mr. Means requests would rob federal courts of power they inherited at their inception: power to preserve order in judicial proceedings and enforce judgments.[38] This Court recently ruled that it would not hesitate to strike down any law which weakens the judiciary's power to enforce its orders as unconstitutionally violative of the separation of powers doctrine. *In re Stone*, 986 F.2d 898, 902 (5th Cir.1993). We refuse to now approve of that which we have so recently condemned—the erosion of a district court's authority to properly compel compliance with its orders. *See McBride v. Coleman*, 955 F.2d 571, 582-83 (8th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992) (Lay, C.J., dissenting) (concluding that "[i]t would seriously erode our system of separation of powers if the executive branch was (sic) effectively immune from the judicial power. The federal courts must have the inherent authority to enforce exe-

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[38] So important and deeply rooted is the federal courts' authority to enforce their orders and punish willful infractions thereupon that the seventeenth section of the Judiciary Act of 1789 provided that all federal courts "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." *As quoted in Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 22 L.Ed. 205 (1873). Writing for the Court in *Ex parte Robinson*, Justice Field began his opinion as follows:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. *The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.*

Id. (emphasis added); *see also United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 33, 3 L.Ed. 259 (1812) (asserting that "[t]o fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . .").

cutive branch compliance with judicial orders. . . . Otherwise, the judiciary would be powerless to impose the most effective remedy for ensuring compliance with its orders against the most frequent litigant in the federal courts").

III. Conclusion

The decision of the district court is AFFIRMED, and we tax all costs and attorney's fees for this appeal against the Government.

EDITH H. JONES, Circuit Judge, concurring specially:

I concur with all of Judge Johnson's fine opinion except for the following bit of dicta:

> To *restrict* a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch, would violate the separation of powers doctrine. (footnotes omitted). (emphasis added)

This is as unfortunate an overstatement as the government's contrary proposition that Judge McBryde's order preventing Means from seeking reimbursement from the Justice Department somehow ***violates*** the separation of executive and judicial powers. This court recently described the scope of a court's sanction against the backdrop of the constitutional separation of powers and concluded that sanctions fall within the court's inherent powers "necessary to the exercise of all others." ***In re Stone***, 986 F.2d 898, 902 (5th Cir.1993), citing ***Roadway Express v. Piper***, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980).[1] ***Stone*** then says:

> Congress may interfere with this category of inherent power within "limits not previously defined," so long

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[1] I do not know whether *Stone's* analysis of inherent powers, borrowed from an Eighth Circuit case, is fully valid. The Supreme Court declined to approve the Eighth Circuit analysis in *Chambers v. NASCO, Inc.*, —— U.S. —— n. 12, 111 S.Ct. 2123 n. 12, 115 L.Ed.2d 27 (1991), but I do not rely upon that aspect of *Stone*.

> as it does not abrogate or render the specific power inoperative. *Id.*, citing *Michaelson v. U.S.*, 266 U.S. 42, 65-66, 45 S.Ct. 18, 19-20, 69 L.Ed. 162 (1924).

On the same page, *Stone* says that

> If the power belongs in the . . . category [of sanctions], we must ascertain whether a valid statute or rule attempts to regulate the court's use of the power. If such a law exists, we then must determine whether the law abrogates or renders the power practically inoperative. *Id.*, citing *Michaelson*, 266 U.S. at 66, 45 S.Ct. at 20.

Stone disposes of this case. That the government says there is a violation of the separation of powers doctrine does not *ipso facto* make it so. The government's concern is too speculative upon the facts before us. First, contrary to the Justice Department's argument, it is not at all clear that its regulation bears on, much less purports to limit the court's independent power to determine how it will sanction a government employee. Second, the Justice Department offered no evidence or argument that Means *would* qualify for reimbursement *but for* the district court's order. Further, the government does not assert that the district court's order actually impinged upon the policy and personnel interests that it asserts are protected by immunity from such an order. These facts counsel against our rushing to opine upon an important constitutional issue. If the regulation affected the court's sanction power to the limited extent of preventing the court from issuing a sanction against an assistant United States attorney individually and non-reimbursably, it appears to me that such a regulation would not render this court's inherent sanction power "inoperative". A court has numerous other types of sanction remedies available against the federal government and its attorneys even if this one is not. To decide this point precisely is, however, unnecessary. The government's argument fails on the facts before us.

APPENDIX B

[Filed May 26, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

ORDER

On May 22, 1992, came on for pretrial conference and hearing the above-styled and numbered action. Plaintiffs, Brenda Chilcutt and The Home Insurance Company, and defendant, United States of America, appeared by and through their attorneys of record. In accordance with the court's rulings at the hearing,

The court ORDERS that:

(1) At 1:00 p.m. on Wednesday, May 27, 1992, defendant shall produce, in the offices of Kelly F. Robbins, counsel for plaintiffs, the originals of each and every item ever requested by plaintiffs in a request for production, or a *duces tecum* list, for inspection and copying by counsel for the plaintiffs. The documents shall be accompanied by an affidavit, if it honestly can be made, a duplicate original of which shall also be filed with the Clerk by 1:00 p.m.

on May 27, 1992, signed by Randell Means, counsel for defendant, in which each item produced shall be lisited and described and which shall state (a) that every item responsive to plaintiffs' discovery requests has been produced, and is listed in the affidavit, (b) that he has made inquiries of such a nature as to be calculated to disclose the existence of any item of any kind or character called for by any of plaintiffs' discovery requests, (c) the identity (by name, name of employer and job title) of each person he contacted with regard to ascertaining the existence of and locating items responsive to plaintiffs' requests, and (d) the response of each person contacted;

(2) If Randell Means cannot honestly make the affidavit contemplated by item (1) above, he shall file with the Clerk by 1:00 p.m. on May 27, 1992, an affidavit signed by him in which each item produced shall be listed and described and which shall describe in detail each and every reason why he is unable to make an affidavit of the kind contemplated by item (1) above;

(3) At 1:00 p.m. on Wednesday, May 27, 1992, defendant shall produce, in the offices of Kelly F. Robbins, counsel for plaintiffs, for inspection and copying by her, the originals, organized in chronological order, of all records of Marilyn Chapman from January 1, 1986, through January 1, 1992, regarding (a) the accident that is the subject of this action or (b) the employment and all activities by her, and any one acting on her behalf, as contractor for the government;

(4) At 1:00 p.m. on Thursday, May 28, 1992, defendant shall produce in the offices of Kelly F. Robbins, counsel for plaintiffs, Marilyn Chapman so that plaintiffs' counsel can at that time take her oral deposition;

(5) Immediately prior to or following the deposition of Marilyn Chapman on May 28, 1992, counsel for the parties shall confer in person with the goal of determining whether additional facts can be the subject of stipulation between the parties;

(6) On or before 10:00 a.m. on Friday, May 29, 1992, the parties shall file a supplement to the pretrial order in which they shall set forth such additional facts with regard to which they have been able to reach stipulation;

(7) The court holds in abeyance the request by plaintiffs for sanctions based on the failure of defendant to comply with its discovery obligations, except, being unable to find that such failure by defendant was substantially justified or that other circumstances make an award unjust, the court is awarding to plaintiffs against Randell Means, counsel for the government, recovery of all reasonable expenses, including attorneys' fees, caused by the failure of defendant to comply with its discovery obligations, which will include fees and expenses devoted to preparation and service of Plaintiffs' Motion for Sanctions, and Motion to Compel Answers to Interrogatories and Request for Production, attendance at the hearing held May 22, 1992, preparation for presentation of plaintiffs' motions at such hearing, and the taking of the deposition of Marilyn Chapman;

(8) If plaintiffs wish to pursue the matter of recovery of fees and expenses contemplated by part (7) above, plaintiffs' counsel shall file and serve on or before Friday, May 29, 1992, a statement of all fees and expenses claimed by plaintiffs, which shall be itemized in detail and must be supported by the affidavit of counsel for the plaintiffs;

(9) Randell Means shall have until 4:00 p.m. on Monday, June 1, 1992, within which to respond

to any statement filed and served pursuant to the authority of item (8) above; and

(10) Plaintiffs are granted leave to file, on or before 4:00 p.m. on Monday, June 1, 1992, any motion made necessary by any inadequacy in discovery responses and conduct of defendant that has not been the subject of a prior motion.

SIGNED May 26, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX C

[Filed Jun. 2, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT AND
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

ORDER

On June 1, 1992, came on for hearing the above-styled and numbered action. Plaintiffs, Brenda Chilcutt and The Home Insurance Company, and defendant, United States of America, appeared by and through their attorneys of record. In accordance with the court's rulings at the hearing,

The court ORDERS that:

(1) On or before 2:00 p.m. on June 2, 1992, defendant shall file an itemization of all work done and expenses, including the dollar value thereof, incurred by the government in representing Mr. Means, individually;

(2) In keeping with the rulings made by the court in paragraph 7 on pages 3 and 4 of the order signed by the court May 26, 1992, on or before 2:00 p.m. on June 8, 1992, Randell Means, individually, shall

pay the sum of TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($2,500.00) to plaintiffs, by and through Kelly F. Robbins, as reasonable expenses, including attorney's fees, caused by the failure of defendant to comply with its discovery obligations;

(3) On or before 10:00 a.m. on June 9, 1992, Randell Means, individually, shall file an affidavit in which he verifies that he has paid the $2,500.00 sanction with his own personal funds and that he has not sought or received, and will not seek or receive, reimbursement from the government for all or any part of such sum;

(4) On or before 2:00 p.m. on June 3, 1992, defendant shall file its response, if any, to plaintiff's supplemental motion for sanctions filed June 1, 1992; and

(5) The parties be, and are hereby, granted an extension until 4:00 p.m. on June 2, 1992, in which to file their exhibit lists, witness lists and proposed findings of fact and conclusions of law. Additionally, the parties shall file on or before 4:00 p.m. on June 2, 1992, a revised supplement to the pretrial order in keeping with the instructions given by the court at the hearing held June 1, 1992.

SIGNED June 2, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX D

[Filed Jun. 4, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT AND
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Came on to be heard on June 4, 1992, plaintiffs' supplemental motion for sanctions. Appeared before the court plaintiff Brenda Chilcutt, who appeared in person and by and through her attorney of record; plaintiff The Home Insurance Company, by and through its attorney of record; and defendant, United States of America, by and through its attorney of record. As the court announced at the commencement of the hearing, the record of the hearing includes the records of the hearing held May 22, 1992, and the hearing held June 1, 1992. For the reasons stated by the court into the record, the court has determined that, as sanctions, the following designated facts, as set forth in 1, 2, 3 and 4 below, shall be taken to be established for the purposes of this action:

1. The place where plaintiff Brenda Chilcutt fell on the occasion in question was unreasonably slick

and hazardous to anyone walking at that place on that occasion.

2. Defendant, United States of America, knew, prior to Brenda Chilcutt's fall on the occasion in question, of the existence of the condition that caused her to fall and knew that such condition created an unreasonable risk of harm to invitees, such as Brenda Chilcutt.

3. Such condition existed on the occasion in question because of negligent conduct on the part of defendant and because of defendant's failure to exercise that degree of care that a person of ordinary care and prudence would have exercised under the same or similar circumstances.

4. The fall Brenda Chilcutt suffered on the occasion in question was proximately caused by such negligent conduct.

(The words "on the occasion in question", as used in 1, 2, 3 and 4 above, mean the occasion on or about October 4, 1988, when Brenda Chilcutt had a fall at premises occupied by the United States Postal Service, to which the parties refer in section (f) on pages 2-3 of the Pretrial Order filed in this action on May 22, 1992.)

The court has concluded that the sanction defined by this order is just, under the circumstances, considering the failures of defendant to honor its discovery obligations.

The court, therefore, ORDERS that each of the facts set forth in 1, 2, 3 and 4 above be, and are hereby, taken to be established for the purposes of this action.

SIGNED June 4, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX E

[Filed Jun. 6, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM AND ORDER

Came on to be considered the motion of United States of American and Randell P. Means to stay execution of the June 1, 1992, order of the court. From the contents of the motion and its supporting memorandum, the court assumes that the motion and supporting memorandum are intended to have reference to (i) the order signed by the court June 2, 1992, pertaining to payment by Randell Means of reasonable expenses to counsel for the plaintiff in this action because of the failure of defendant, United States of America, to comply with its discovery obligations, and (ii) rulings made from the bench on those subjects on June 1, 1992.

The court conducted a hearing in this action on May 22, 1992, on motions filed by plaintiffs, Brenda Chilcutt and The Home Insurance Company, for sanctions and to compel defendant, United States of America, to answer inter-

rogatories and to respond to a request for production, both of which discovery requests had been served by plaintiffs on defendant in March 1992. Plaintiffs proved, and defendant, through counsel, admitted, that defendant had not answered the interrogatories or responded to the request for production prior to the filing of plaintiffs' motions, even though the time for answer and response had expired weeks before the motions were filed. At the conclusion of the May 22 hearing, the court made orders from the bench, which included an order awarding to plaintiffs against Randell Means, as counsel for defendant, recovery of all reasonable expenses, including attorney's fees, caused by the failure of defendant to comply with its discovery obligations. The order was made pursuant to the authority of Fed. R. Civ. P. 37(d), which provides, *inter alia,* that, in the event of failures of a party to comply with his or her discovery obligations, the court, in lieu or in addition to an order of sanctions, "shall require the party failing to act *or the attorney* advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." (emphasis added). As expressed into the record at the hearing, the court was unable to conclude that the failure of defendant to comply with its discovery obligations was substantially justified or that other circumstances would make an award to plaintiffs of expenses unjust. The court explained why the award was not being made against defendant, but, instead, was being made against defense counsel by saying:

> The recovery will be against the attorney for the government and not the government. I don't think that this sort of thing should be borne by the taxpayers.

Rough draft of partial transcript of May 22, 1922, hearing, at 6. The rulings made by the court at the May 22 hearing were reduced to writing by an order signed by the court on May 26, 1992.

On June 1, 1992, the court heard the parties on the subject of the amount of the expenses that should be awarded to plaintiffs against Mr. Means; and, the court determined that an appropriate award would be $2,500.00. The rulings made by the court at the June 1 hearing were reduced to writing by order signed June 2, 1992. In keeping with the intent of the court that Mr. Means, and not the defendant, would be the one to bear the burden of the payment, the court ordered that Mr. Means not seek or receive reimbursement from the government for all or any part of the $2,500.00 payment he was obligated to make; and, the June 2 order directed that, after Mr. Means has made the $2,500.00 payment, he "shall file an affidavit in which he verifies that has has paid the $2,500.00 sanction with his personal funds and that he has not sought or received, and will not seek or receive, reimbursements from the government for all or any part of the sum."

Implicit in the motion of United States of America and Mr. Means to stay execution is the argument that the part of Rule 37 that authorizes the court to order payment by an attorney, instead of the attorney's client, of an award of reasonable expenses does not apply to an attorney representing United States of America or one of her agencies if that attorney happens to be an employee of the Department of Justice. The premises of this argument are (i) that 28 U.S.C.§§ 516 and 519 give the Department of Justice, under the direction of the Attorney General, the responsibility to conduct and supervise litigation to which the United States of America is a party and to direct all United States Attorneys and Assistant United States Attorneys in the discharge of their respective duties and (ii) that the regulation of the Department of Justice that appears at 28 C.F.R. 50.15(c)(1) (to the effect that the Department of Justice may idemnify an employee of the Department of Justice for any verdict, judgment, or other monetary award rendered against the employee, under certain circumstances) is inconsistent with, and prevails over, any power

the court otherwise might have to order that Mr. Means personally bear the burden of the expense payment the court ordered Mr. Means to make.

The net effect of the argument of defendant and Mr. Means is that the Department of Justice has the power to exempt itself from a rule of the Federal Rules of Civil Procedure, or any rule or order of the judiciary, by the simple expedient of adopting a regulation that says it will not be bound by, or that is inconsistent with, the rule or order. The court is not persuaded that the Department of Justice has that power. Indeed, the court is convinced that there would be chaos in the federal court system if the head counsel for the system's major litigant were to be permitted to pick and choose the rules and orders of the judiciary to which the counsel and his client might wish to be bound.

There can be no doubt that, generally, the court has the power to ensure that the attorney, rather than the client, bear the brunt of an expense or sanction award by ordering that the attorney pay the award personally and not receive reimbursement from the client. *See Derechin v. State University of New York,* —— F.2d ——, 1992 WL 83274 (2nd Cir. 1992).[1] If the court did not have the power to prevent the sanctioned attorney from receiving reimbursement, the words in Rule 37 that authorize the award of expenses to be against the attorney, and not the client, would be meaningless. There is no rational basis for exempting United States of America and its

[1] In *Derechin,* the Second Circuit considered the problem in a Fed. R. Civ. P. 11 context. The trial court had ordered that a sanction be imposed on defense counsel and further ordered that defense counsel pay the sanction "personally and without reimbursement from a client or clients or employer." The Second Circuit held that the prohibition against reimbursement should be upheld even though it prevented the attorney, an Assistant Attorney General of the State of New York, from receiving the benefit of a New York statute that arguably gave the Assistant Attorney General the right to be indemnified by the State of New York for the sanction payment.

counsel, even if the attorney is an employee of the Department of Justice, from the judicial power that is required to fully effectuate Rule 37.

Moreover, even if one were to assume that United States of America and Mr. Means could prevail in their appeal from the order that Mr. Means cannot be reimbursed by defendant for his payment of the award of expenses, the court has no reason to think that, if such a reversal were to occur, defendant would not have the wherewithal to reimburse Mr. Means. There has been no suggestion by defendant or Mr. Means that defendant would not be able to accomplish reimbursement at a later date if the appellate court were to conclude that Mr. Means is entitled to be reimbursed. Consequently, there is no necessity, in any event, for a stay of execution of the order of which defendant and Mr. Means complain.

For the reasons given above, the court has concluded that there is no just reason why the motion of defendant and Mr. Means for stay of execution of the court's order should be granted.

The court, therefore ORDERS that the motion of United States of America and Randell P. Means for stay of execution be, and is hereby, denied.

SIGNED June 6, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX F

[Filed Jul. 1, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER
(Under Seal)

During the hearings that were held in late May and early June 1992 in the above-styled and numbered action, the court became concerned with certain representations concerning discovery matters that were being made to the court by Randell P. Means, who has served as counsel for defendant, United States of America, in this action. Representations made by Mr. Means were factors the court considered in deciding on the severity of the sanctions that were imposed on defendant for its discovery abuses, but, before deciding whether disciplinary action against Mr. Means should be considered, the court has waited for an opportunity to review transcripts of the hearings. After having studied the transcripts, the court's concern with the conduct of defense counsel is heightened.

The area of greatest concern has to do with apparent misrepresentations by Mr. Means to the court about the accident log on which the accident of plaintiff Brenda (Chilcutt) Wortham was recorded. U.S. Postal Service MSE Accident Investigator Al Svede prepared the log.[1] The page of the log on which Ms. Chilcutt's accident is recorded is within the scope of requests that are contained in a request for production of documents served by plaintiffs on defendant in March 1992. Defendant had not responded to the request for production by the time of the hearing that was held May 22, 1992, on Plaintiffs' Motion for Sanctions, and Motion to Compel Answers to Interrogatories and Request for Production.

At the May 22 hearing, and by written order signed May 26, 1992, defendant was ordered to produce on May 27, 1992, for inspection and copying by counsel for the plaintiffs each and every item ever requested by plaintiffs in a request for production, or a *duces tecum* request; and, defendant was directed to verify by affidavit of Mr. Means facts concerning the document production that was to be made by defendant. The accident log was not produced by defendant. On May 27, 1992, defendant filed a response to plaintiffs' request for production, which was signed by Mr. Means. The response did not disclose the existence of the page of the accident log on which Ms. Chilcutt's accident was recorded; and, the response falsely indicated that there was no such thing in existence. The declaration[2] made by Mr. Means, in purported compliance with the directive of the May 26, 1992, order for verification by defense counsel concerning the document production, falsely indicated that all docu-

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[1] The page of the accident log in question entitled "U.S. Postal Service Non-Vehicle Accident Register", was identified as court's Exhibit "1" at the June 4, 1992, hearing in this action.

[2] The declaration, which was filed May 27, 1992, is entitled "Defendant's Affidavit of Compliance: Plaintiff's [sic] Request for Production of Documents and Things."

ments to which defendant had access of a kind called for by the request for production had been produced. In reference to the requests that were broad enough to call for production of the accident log, the declaration of defense counsel suggested that the log was not in existence. For example, in reference to request No. 28, which clearly called for the log, Mr. Means declared under penalty of perjury that "[t]here are none"; and, he identified Al Svede as his contact person (the person with whom he discussed existence, *vel non*, of the items called for by the request).

On June 1, 1992, plaintiffs filed their supplemental motion for sanctions, in which plaintiffs complained, *inter alia*, about the failure of defendant to produce the accident log. In reference to the failure of defendant to produce the accident log that had been prepared by Al Svede, defendant said in its response to plaintiffs' supplemental motion for sanctions, which response was signed by Mr. Means, that:

> Plaintiff further complains that Al Svede has not produced his own log relating to the same topic. Defendant has certified, based upon the answer provided by Al Svede, that there is no record of any complaint of the type sought by Plaintiff's request. There being no information of the type sought, as established by a complete search of the proper records of Defendant and the certified answer of Defendant, there is no violation of this Court's orders shown.

At the hearing held June 4, 1992, on plaintiffs' supplemental motion for sanctions, counsel for plaintiffs made further complaint about the failure of defendant to produce the accident log. *See e.g.* Transcript of Proceedings of June 4, 1992 ("Tr. 6/4/92") at 45. When plaintiffs' counsel pursued the matter, the following exchanges occurred:

THE COURT: Well, why haven't those accident logs been produced?

MR. MEANS: Your Honor, as our motion sets out, the request related specifically to anything that dealt with these premises. *A search has been conducted of those accident logs, as we have set out in our response to this supplemental motion, and there is no record in those logs relating to any accident or complaint on the premises of River Bend for the time—*

THE COURT: Well, that takes care of it. That's what she has asked for.

And if you can at some point in time prove they misrepresented to you in saying that there is nothing, then they have got a different problem. But so far the representation is that there is nothing.

MS. ROBBINS: Well, Your Honor, we do know of two accidents that occurred at that premises, and they would be listed in that log.

THE COURT: Well, I have got to assume they don't do a very good job of keeping their records because *it's been represented that there is no record of those accidents.*

Is that what you are representing?

MR. MEANS: *That is correct, Your Honor.*

THE COURT: Even though there are two other accidents on the premises, the post office department did not keep a record in any of its logs, accident logs or other books, of those accidents.

MR. MEANS: There is one accident that was reported. That is the Chilcutt[3] accident this case is based on. And my representation is the same as what is reflected here. *Yes, Your Honor, there is no record of that in this log.*

She refers to a second accident that occurred, and no further reporting was made. And the document

[3] The name "Chilcutt" is misspelled "Chillcut" throughout the transcript. The court has taken the liberty to use the correct spelling in all language taken from the transcript.

that was filled out at the scene of the River Bend post office and has remained at that location has been produced, and there is no other notation in the log of that transaction.

MS. ROBBINS: I'm sorry. Is there any notation in the log about it or not other besides that?

THE COURT: He said there's no notation in the log.

MS. ROBBINS: No other, or no notation.

MR. MEANS: *There is no record.*

As our response to this supplemental motion states, I am stating under oath before the court as an officer of the court that my representations in that motion are correct, that a search of that log has been conducted, and no accident has been identified to the time periods in that log—and I believe it's 1987 through the present—for the premises, River Bend Finance Unit, for both employee accidents or complaints or customer accidents.

Tr. 6/4/92 at 48-50 (emphasis added). And:

THE COURT: Well, I guess what I am going to have to do, then, I am going to have to let Mr. Means represent to me as an officer of the court that he views his response to be true and correct; that is, Defendant's Response to Plaintiff's Supplemental Motion for Sanctions, which was filed by the defendant yesterday, June 3, 1992.

Do you make that representation?

MR. MEANS: *I do certify that [representation][4] under oath, Your Honor, that I made the examinations and conferred with the individuals noted therein.*

THE COURT: *I am just asking you: Do you represent that everything in that response is true and correct?*

MR. MEANS: *Yes, Your Honor.*

Id. at 51-52 (emphasis added).

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[4] In the transcript the word "representation" is incorrectly shown as "reputation."

When plaintiffs' counsel continued to insist at the June 4 hearing that documents pertaining to plaintiff Chilcutt's accident were being withheld, the court decided that the appropriate thing to do would be to order Mr. Svede, and another potential witness, to appear before the court at 2:00 p.m. on that date with certain documents, including accident logs. *Id.* at 60. At a later point in the proceeding, before Mr. Svede appeared before the court, the following exchange occurred as the court and counsel were discussing records that had not been produced by defendant:

> MR. MEANS:
>
> . . . .
>
> And the record of accidents or conditions on the premises are the accident logs that have been described earlier, and those have been served and are maintained locally—
>
> THE COURT: But apparently they are not complete.
>
> MR. MEANS: *Apparently they do not have a copy or any representation of the Chilcutt transaction.* And that's the only evidence to indicate that they are incomplete, because that's the only report that has been verified that actually occurred.
>
> THE COURT: Well, it turns out to be kind of important in this case. *The very accident involved in this lawsuit doesn't happen to be in the log.*
>
> MR. MEANS: *Yes, Your Honor. But all the records pertaining to this accident have been presented. There is not anything that failure to produce the log entry fails to show.*

Id. at 71 (emphasis added).

When Mr. Svede appeared before the court the afternoon of June 4, he readily acknowledged, upon questioning by the court, that he listed plaintiff Chilcutt's accident in his log:

Q. Did you list Ms. Chilcutt's accident in your accident log?

A. Yes, I did.

Id. at 95.

Mr. Svede produced the accident log, which showed the entries he made pertaining to plaintiff Chilcutt's accident and also showed that three other United States Postal Service patrons had suffered falls in lobbies of United States Postal Service facilities in Fort Worth relatively near in time to plaintiff Chilcutt's accident. *See* court's Exhibit "1" to 6/4/92 hearing. Plaintiffs' counsel had never seen the accident log until witness Svede produced it at the June 4 hearing. *See e.g. Id.* at 99 and 101.

When Mr. Means was confronted with the truth concerning the accident log, his only excuse for not having previously produced it was:

THE COURT: Okay. Why has she not seen that before today, Mr. Means?

MR. MEANS: It is not covered by any document production request or subpoena duces tecum. The search that was conducted—

Tr. 6/4/92 at 105. Counsel for defendant disclaimed "any trickery or improper motive on the part of defendant United States, particularly the client defendant United States and U.S. Postal Service":

THE COURT: Well, you are entitled to disagree with the court.

While you are disagreeing I might also point out that, if the government had honestly responded to the request for production, it also would have produced the request for production, it also would have produced the investigation logs in response to item 28 of the request for production, which clearly called for the entry in that log pertaining to Ms. Chilcutt's accident, which would have then caused the page of the log that we were referring to during the course of the hearing to be produced.

MR. MEANS: To the extent that item 28 would refer to the plaintiff's own request, Your Honor, I can not quarrel with the court's characterization. I would only submit—and *I recognize my credibility at this moment before this court may not be much* —but I submit that accident log page was not withheld as a result of any trickery or improper motive on the part of the defendant United States, particularly the client defendant United States and U.S. Postal Service.

And, personally and professionally as counsel, it was, as discussed in the—

THE COURT: Okay. You have run out of time.

MR. MEANS: I will draw the court's attention to Exhibit B that does discuss the log. And that's all I would have, Your Honor.

Id. at 144 (emphasis added). Yet, Mr. Means never gave any satisfactory explanation for his misrepresentations to the court relative to the accident log that was produced by defendant only after the court ordered Mr. Svede to appear before the court.

The appearance is that Mr. Means might well:

(a) be guilty of contempt of the authority of the court in violation of Title 18, United States Code, § 401;

(b) be incompetent to practice before this court because of unethical behavior and, perhaps sheer inability to conduct litigation properly, within the contemplation of Rule 13.2, Local Rules of the United States District Court for the Northern District of Texas;

(c) have signed papers of United States of America in violation of the certifications requirements of Fed. R. Civ. P. 11 [5]; and

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[5] Rule 2.1(f) of the Local Rules of the United States District Court for the Northern District of Texas provides, in pertinent part, that "[t]he provisions of Rule 11 of the Federal Rules of Civil Procedure must be strictly enforced."

(d) have subjected himself to disciplinary action under the inherent powers of the court.

The court recognizes the significance of the possibility that the conclusion might be reached that a member of the staff of the United States Attorney for the Northern District of Texas has been guilty of criminal conduct in his dealings with the court. Therefore, the court intends to proceed with special caution. The court is directing the Clerk to place this order under seal, at least for the time being. Moreover, rather than to issue at this time an order for a formal show cause hearing, the court is giving Mr. Means opportunity to explain his conduct at a less significant hearing, which might be characterized as a "hearing preliminary to the possible issuance of a show cause order" (hereinafter "preliminary hearing"). However, such a preliminary hearing will be held only if Mr. Means requests such a hearing. If Mr. Means prefers to proceed directly to issuance of a show cause order, he should so advise the court.

The court ORDERS that Randell P. Means shall have until 4:00 p.m., Monday, July 6, 1992, within which to file with the Clerk a document, which will be filed under seal if the caption of the document indicates that it is to be sealed, in which he informs the court of his wishes with respect to the holding of a preliminary hearing concerning to the matters mentioned in this order; and the court further ORDERS that plaintiffs and defendant have leave to file on or before such time and date any item they wish to file in reference to the subject matter of this order and that if any such item is filed it shall indicate in its caption that it is to be sealed.

The court further ORDERS that the Clerk shall place this order, as well as documents that are filed pursuant to the directive or authorization given above, under seal, subject to further order of the court.

SIGNED July 1, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX G

[Filed Jul. 28, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs,

VS.

UNITED STATES OF AMERICA,
Defendant.

ORDER

On July 28, 1992, came on for hearing, pursuant to the court's order of July 7, 1992, the above-styled and numbered action. Plaintiffs, Brenda Chilcutt and The Home Insurance Company, appeared by and through their attorney of record. Randell P. Means appeared by and through his attorney of record. Having heard the evidence and arguments presented, the court determined that, whether the conduct was intentional or grossly negligent, entry of the following order would be appropriate:

The court ORDERS that:

(1) All orders under seal be, and are hereby, unsealed.

(2) A transcript of the hearing of July 28, 1992, be included as part of the record on appeal, in the

event any of the court's rulings in this action are appealed.

(3) On or before November 1, 1992, Randell P. Means shall attend fifteen (15) hours of a course or courses at an accredited school or through continuing legal education programs sponsored or approved by the State Bar of Texas on the subject of ethics or professional responsibility, tuition for which shall be paid by Means, individually, and he shall not seek or accept reimbursement from any person or entity. On or before November 16, 1992, Randell P. Means shall file an appropriate affidavit setting forth with specificity everything he has done to comply with this order. After the affidavit is received and reviewed, the court will decide whether further information about, or proof of attendance at, such course or courses should be required.

(3) On or before August 29, 1992, Randell P. Means shall pay to Kelly Robbins, counsel for plaintiffs, the sum of SIX HUNDRED TWENTY-FIVE DOLLARS ($625.00), which shall be paid by him individually and for which he shall not seek or accept any reimbursement from any person or entity.

The court considers that Randell P. Means is on something in the nature of probation with the court in the sense that the court will take into account his conduct in this action if the court has occasion in the future to determine whether sanctions should be imposed on, or disciplinary action should be taken against, him in the event he again engages in inappropriate conduct in his dealings with the court or in matters before the court.

SIGNED July 28, 1992.

/s/ John McBryde
JOHN MCBRYDE
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1668

BRENDA CHILCUTT and HOME INSURANCE COMPANY,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant,

RANDELL P. MEANS, in his individual capacity,
Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(December 22, 1993)

Before JOHNSON, JOLLY, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:91-CV-277-A

BRENDA CHILCUTT and
THE HOME INSURANCE COMPANY,
Plaintiffs

VS.

UNITED STATES OF AMERICA,
Defendant

Fort Worth, Texas
July 28, 1992

TRANSCRIPT OF PROCEEDINGS
(Hearing Preliminary to Issuance of Show Cause Order)

BEFORE THE HON. JOHN MCBRYDE,
United States District Judge

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[3] PROCEEDINGS

THE COURT: Good morning.

Okay. We're here on No. 4:91-CV-277-A. We're here pursuant to an order I signed July 7, 1992 that was entered as a result of a request made by Mr. Means for a hearing preliminary to the possible issuance of a show cause order. That request, in turn, was made by Mr. Means in response to a suggestion I made in an order signed July 1, 1992 that Mr. Means might make such a request in lieu of having me issue at that time a show cause order.

Okay. And present is Kelly Robbins, the attorney for the plaintiff in this case; Mr. Means; and Jonathan Kerr, who is the personal attorney for Mr. Means.

Is that correct?

MR. KERR: That is correct, Your Honor.

THE COURT: Okay. I notice Mr. Collins is in the audience. I invited him to be present, and I left it up to his judgment as to whether or not he would be here.

And I am pleased that you are present, Mr. Collins.

Is this Mr. Svede?

MR. SVEDE: Yes, sir.

THE COURT: Okay. Thank you for being present.

And, Mr. Brown, I appreciate you being present.

Claude Brown is here also.

[4] Mr. Kerr, I'm going to let you make a preliminary statement, but before you do let me kind of summarize where we are.

I set forth in my July 1, 1992 order in some detail the greatest concern I had in reference to representations that were made by Mr. Means to the court during the course of the hearings that were held in this case in late May and early June 1992. I put in some detail the exchanges that occurred between counsel and the court in reference to the matter of an accident log and also put in the order in some detail the events that led up to that exchange.

I'm not going into at this hearing other representations that I considered to have been questionable that were

made by Mr. Means at the hearings. I'm going to concentrate on the subject of the accident log, which appeared to be a rather flagrant case of misrepresentation by Mr. Means, as well as a rather flagrant violation of the discovery obligations.

Before I invite you to make a statement, Mr. Kerr, I would like to know if either you or Mr. Means has any disagreement with any of the factual statements that are contained in the order I signed on July 1, 1992?

MR. KERR: Your Honor, I haven't reviewed it with that in mind. Everything the court said from the transcripts and from the pleadings that are on file is accurately reflected. We disagree with the conclusion that there was a [5] misrepresentation, as the evidence will show. We have no problem with the specific facts.

THE COURT: Okay. That is what I was trying to find out, if there was anything factually set forth within the order that there is any disagreement with.

MR. KERR: No. Your Honor.

THE COURT: Okay. Why don't you at this time, Mr. Kerr, make whatever statement or explanation you want to make in behalf of Mr. Means, concentrating on the points that are made in my July 1, 1992 order?

MR. KERR: If it please the court, Your Honor.

We, too, have focused on the situation with the log which is shown as, I guess, Al Svede's log, for purposes of these hearings.

Your Honor, most of what we have to say is going to be from two witnesses: We are going to have Mr. Svede testify and then Mr. Means.

The first thing that the court needs to understand that I don't think Mr. Means made clear at the hearing on June the 4th is that there are, in fact, maintained at that postal complex out on Mark IV Road—I think it is called the Sectional Mailing Center off the big post office complex—but out at that complex there are actually two sets of logs. We have them in front of you here today. And one set of logs is maintained by the Safety Office.

We are going to have testimony on that. [6] That is maintained under the direction of Mr. Kunkel.

THE COURT: Mr. who?

MR. KERR: Kunkel. K U N K E L, I believe. He's present in the courtroom, Your Honor.

And there is a second set of logs, the ones that came into question at the June 4 hearing that were maintained by Mr. Svede, Al Svede, S V E D E.

There was some considerable confusion about which logs had been reviewed and what the contents of those logs were.

The testimony will be that Mr. Means did not know of the existence of the Al Svede log; that is, the one he told the court, both in pleadings and from this podium, that didn't exist. He didn't know they existed until an hour-and-a-half before the hearing on June 4 resumed at 2:00 p.m. That would be the uncontroverted testimory.

And, second, he didn't know about it—not through his own failure—he didn't know about it because of an error or misunderstanding and lack of communication and confusion regarding what was in these two different logs. He, in fact, had examined Mr. Kunkel's logs themselves and had been assured that those were the only logs applicable.

Mr. Means did not intentionally hide and conceal records and did not violate Rule 11 or Rule 13(2) of the local rules or the Dondi Properties decision because we'll maintain the evidence will show he made a reasonable effort; and, based on [7] his reasonable effort, he reached certain conclusions that he thought were true testimony, based on the information he had available to him.

We're going to prove all that, Your Honor. But before we do that I want to make one observation, just from reading the transcripts and the events that occurred surrounding the discovery in this case.

Mr. Means didn't intentionally withhold these documents and he wasn't negligent in not locating them, as we'll show in detail. And I don't need to bore the court or take the court's time with what the evidence is going

to be from the witness stand. But what I will say is that part of the problem, I think, in what Mr. Means told the court on June the 4th results from two things: One, from reading that transcript, it appears, with all due respect to Mr. Means, that at times he is constitutionally incapable of making a singular declaratory answer to a direct question from the court. I suffer from the same affliction. Call it lawyeritis or whatever you want to call it.

And you take that attribute, coupled with the fact that he had made a diligent search and been told these logs didn't exist, and, lo and behold, they appear.

He was in a situation that afternoon that, I guess, is the courtroom equivalent of a rabbit caught in headlights. And he made a statement to the court that the documents weren't [8] produced because they weren't within the call because they didn't fit any request for document production by the plaintiffs.

That was a poor argument. That was an argument he made, I think, in an attempt to protect his client because his activity at that point wasn't in question. I think he regrets that argument, but it doesn't make him a liar and it doesn't make him unskilled or incapable of practicing law in this court.

With that, Your Honor, unless the plaintiffs' counsel wants to have the opportunity to respond, we're ready to call our first witness.

THE COURT: Okay. Let me clarify a position.

Is it Mr. Means' position that at the time of the June 4 hearing when Mr. Svede testified that he was not aware that there was a log kept by Mr. Svede of accidents?

MR. KERR: He was aware—No, that is not his position. He was aware there was a log kept, but he thought the log he had looked at was Mr. Svede's log, and, in fact, it was Mr. Kunkel's log.

THE COURT: He knew before the hearing that there were two logs, one kept by Kunkel and one kept by Svede?

MR. KERR: No, he did not know prior to the hearing that there were two sets of logs. He did not know

that until Mr. Svede showed up with his own log in Mr. Means' office, at the U.S. Attorney's Office, an hour-and-a-half before the [9] hearing resumed at 2:00 o'clock.

THE COURT: An hour-and-a-half before what?

MR. KERR: Before the hearing resumed at 2:00 o'clock. The court issued an order at the break. Mr. Svede brought everything he had to the courthouse, and there was this second log Mr. Means hadn't seen and didn't know existed.

The COURT: And you are telling me that Mr. Means first knew of the existence of a log maintained by Mr. Svede during the noon hour on June 4?

MR. KERR: He knew that Mr. Svede maintained the log, Your Honor. He knew that. But it was his understanding that that log that Mr. Svede had access to —whether he maintained it or not—but the only log he knew existed was the log that Mr. Svede had given him and he had examined. He examined it on the 26th of May in Mr. Svede and Mr. Kunkel's presence. He thought that was the only log. Okay? And that's these books right here, Your Honor. He looked at those logs.

THE COURT: Okay. Go ahead and finish what you were saying.

MR. KERR: He determined that there was no reference to the Chilcutt case or any accident at River Bend in these sets of logs. These are Safety Office logs. Okay? He looked at those. He had been told about those on more than one occasion.

Then that's why he told the court there was no reference—

[10] THE COURT: Okay. I guess what I'm having a little trouble with: Are you telling me that until the noon recess on June 4 that Mr. Means thought there was only one log?

MR. KERR: That is absolutely right.

THE COURT: That is what I'm trying to find out.

MR. KERR: Yes, sir.

THE COURT: Whose log did he think it was? Who did he think maintained it?

MR. KERR: Mr. Kunkel.

THE COURT: Okay.

MR. KERR: The one that he had looked at he thought Mr. Kunkel maintained it because he saw it in Mr. Kunkel's office, and that is what he was told.

THE COURT: So he didn't think before the noon hour on June 4 that Mr. Svede maintained the log?

MR. KERR: That is correct.

THE COURT: That is what I am trying to find out.

MR. KERR: That is correct.

THE COURT: Okay. You may proceed.

MR. KERR: We'll call Al Svede at this time, Your Honor.

THE COURT: Okay. Come forward, Mr. Svede.

Mr. Svede, you were sworn at an earlier hearing in this case, and that sticks. You are still under oath.

THE WITNESS: Yes, sir.

[11] MR. KERR: Your Honor, does the court have what has been marked as Court Exhibit No. 1, which is the two pages from Mr. Svede's log?

THE COURT: Yes. Here it is.

MR. KERR: May I have those and approach the witness?

THE COURT: Yes.

AL SVEDE,

having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KERR:

Q. Would you tell us your name, please, sir?

A. Al Svede.

Q. And you are the accident investigator for the Mailing Sectional Center here in Fort Worth; is that correct?

A. Correct.

Q. And your office is out at the General Mail Facility, which is a complex on Mark IV Road or Boulevard, Parkway, north of downtown; is that correct?

A. Correct.

Q. And you have held the position of accident investigator six years?

A. Approximately six and a half years, yes, sir.

Q. And you investigated the claim filed by one of the plaintiffs in this case, Brenda Chilcutt; is that correct?

A. Yes, sir.

[12] Q. And after suit was filed by Ms. Chilcutt you worked with Mr. Randell Means to locate and assemble documents responsive to requests that had been made by the plaintiffs, Ms. Chilcutt; is that correct?

A. Correct.

Q. And did you start working with Mr. Means on that process sometime around April 20, April 22, sometime in that time frame?

A. Approximately, yes.

Q. And you testified in this courtroom on June the 4th; is that correct?

A. Yes, sir.

Q. And, Mr. Svede, you have in front of you what's been marked as Court Exhibit No. 1.

Would you tell us what that is, please sir?

A. It's a non-vehicle accident register.

Q. And is that a document that you kept yourself?

A. Yes, sir.

Q. And, Mr. Svede, when did you first show that document—or, to your knowledge, when did Mr. Means first see that document?

A. It was approximately noon on June the 4th, just prior to a hearing.

Q. When you brought it to Mr. Means' office?

A. Correct.

[13] Q. And the two pages that are marked as Court Exhibit No. 1 are actually two pages out of the entire

set of entries or logs that relate to a particular time period; is that right?

A. Yes, sir.

Q. And what time period is that?

A. Fiscal year 1989.

Q. All right, sir. And when you began working with Mr. Means in April up through the time when Mr. Means first saw that document on June 4, where was your non-vehicle accident report or your log kept?

A. It's kept in my office. We keep the current 3 years, present year and two years back, in a register book. Years prior to that we roll up and keep in a file cabinet.

Q. Physically, sir, where were those two pages that are in front of you during the time you were working with Mr. Means to collect and produce documents?

A. They were rolled up in the file cabinet in my office.

Q. Let me direct your attention to this stack of documents, if I could.

And "rolled up," you mean rolled up like this; is that correct?

A. Yes, sir.

MR. KERR: Your Honor, given the nature of this hearing and the nature of these documents, I don't want to mark them, but I'll just state Mr. Svede, for the record, has [14] identified these two rolled-up pieces of paper with rubber bands around them.

Q. (By Mr. Kerr) Isn't that how the log that you have in front of you, Exhibit 1, was kept in your filing cabinet during the time you were working with Mr. Means?

A. Correct.

Q. And this book that has non-vehicle accident log on it, a black notebook about an inch-and-a-half thick, was the one that was current that was kept inside your filing cabinet?

A. Correct.

Q. Now, Mr. Svede, do you have any knowledge whatsoever that Mr. Means saw or read those two pages

you have in front of you, the non-vehicle accident report, Court Exhibit No. 1, before you showed it to Mr. Means' on June 4, 1992, a little after noon in his office?

A. No.

Q. And prior to June 4 did you ever discuss the non-vehicle accident register with Mr. Means. Prior to June 4.

A. No, I did not.

Q. Now, just generally, Mr. Svede, as best you recall, how many occasions prior to June 4, the day of the hearing, did you meet face-to-face with Mr. Means out at the post office complex?

A. Three times, I believe.

Q. And on each of those occasions were you and Mr. Means both [15] working to collect documents that would be responsive or within what was called for by the plaintiffs' document request?

A. Yes, sir.

Q. And in addition to these face-to-face meetings, Mr. Svede, how many phone conversations did you have, approximately, with Mr. Means from the time you started working with him until the June 4 hearing?

A. Six or seven, I'm sure.

Q. And in how many of those discussions that you had with Mr. Means prior to June 4, whether it was face-to-face or on the phone, did the two of you review the various categories or items of documents requested by the plaintiffs?

A. I believe we did each time.

Q. And on each of these occasions did Mr. Means ask you to assist him in collecting documents from the post office and the post office employees that would be responsive to each of the categories that you went over?

A. Yes, sir.

Q. And did, in fact, he meet with other post office employees other than yourself?

A. Yes, sir.

Q. How do you know that he did that?

A. I was with him.

Q. And prior to June 4 in these telephone discussions or face-to-face meetings or meetings with other post office [16] employees where you were with him, did you ever specifically tell Mr. Means that your log in front of you, the non-vehicle accident register, Court Exhibit 1, might be called for by the requests for production of documents?

A. No, sir.

Q. Did you ever even tell him that you had it?

A. I don't specifically recall that, no.

Q. Now, you had discussed with Mr. Means, though, did you not, sir, sometime during the first half of May of 1992 this other set of logs that we have in the courtroom, which is on counsel table right here? Did you, sir?

A. Yes.

Q. So we'll have something to call those, those are the Safety Office logs; is that correct?

A. Correct.

Q. And those are maintained by Mr. Kunkel; is that correct?

A. Correct.

Q. I'm sorry. I forgot Mr. Kunkel's first name. For the record—

A. Bob.

Q. Bob Kunkel?

And when did you first tell Mr. Means, as best you can recall, about those Safety Office logs?

A. I can't recall the exact date that was—

Q. You recall the circumstances?

[17] A. Right. I believe that was initially brought out in my deposition about the logs.

Q. Right, sir.

And what did you tell Mr. Means about those Safety Office logs?

A. I can't recall exactly what was said. The subject was brought up, and I said that there are some logs kept in the Safety Office.

Q. All right, sir. You told Mr. Means there were some logs kept in the Safety Office?

A. Correct.

Q. And did you tell him that you would undertake to look at those logs or have someone do it to determine whether those logs referred to either the Chilcutt case or any other accident at River Bend post office?

A. Correct.

Q. And did you do that?

A. Yes, I did.

Q. Did you report back to Mr. Means?

A. Yes, I did.

Q. What did you tell him?

A. I told him there was no notation about the Chilcutt accident in any of the files or logs.

Q. And—

THE COURT: I'm sorry. What did you tell him?

[18] THE WITNESS: I told him there was no notation of the Chilcutt accident in any of his logs.

THE COURT: Any of whose logs?

THE WITNESS: Mr. Kunkel's.

THE COURT: That was in response to a request by Mr. Means for you to determine what?

THE WITNESS: Just to see if it was in his log books, to see if the Chilcutt accident was in his log books.

THE COURT: Is that a recording made of all the accidents that occurred on the post office premises?

THE WITNESS: Normally we do that, yes, sir. We both keep running logs and we both keep the same ones. This one, however, for some reason, missed the system.

THE COURT: Okay. Was your log book the only log book that had the Chilcutt accident reported in it?

THE WITNESS: Yes, sir.

THE COURT: And tell me—As well as you can, reconstruct it. What was the question posed to you by Mr. Means that caused you to inquire of Mr. Kunkel as to whether the Chilcutt accident was recorded in his log?

THE WITNESS: The best I recall Mr. Means asked me to check with Mr. Kunkel in his logbooks and see if the entry was there.

THE COURT: Had you not said anything at any time to Mr. Means about having a log book of your own in which [19] accidents were recorded?

THE WITNESS: I believe I brought up the log book in my deposition, but that's the only—

THE COURT: When was that given?

THE WITNESS: The exact date I don't recall. I am not sure of the exact date, Your Honor.

THE COURT: Okay. Sometime in April or May of 1992?

THE WITNESS: Yes, sir.

THE COURT: And did you during the deposition make known there were two different sets of logs, one that you maintained and one that Mr. Kunkel maintained?

THE WITNESS: I don't know if that was specifically brought out, but I did mention a log.

THE COURT: Did you mention the one that you maintained?

THE WITNESS: Yes, sir.

THE COURT: And was there any inquiry of Mr. Means of you as to whether the logs you maintained had reference in it to the Chilcutt accident?

THE WITNESS: No, sir.

THE COURT: You never inquired along that subject?

THE WITNESS: No, sir.

THE COURT: Okay. You can go on.

MR. KERR: If I could approach the witness, Your Honor, and show him the page from his deposition that was given [20] on April 22nd of 1992.

THE COURT: Okay.

Q. (By Mr. Kerr) Mr. Svede, let me hand you—

MR. KERR: Your Honor, do you have a copy of that?

THE COURT: I think you better start marking things as exhibits that are not already exhibits so we'll know what you are talking about.

MR. KERR: All right. We'll mark the deposition of Al Svede as Means Exhibit No. 2.

MR. KERR: Your Honor, do you have a copy of the deposition?

THE COURT: No.

While you are doing that, let me clarify one thing with Mr. Svede.

Did you ever tell Mr. Means that there was no record in your log of any complaint made by Ms. Chilcutt?

THE WITNESS: No, sir.

THE COURT: Did you ever tell Mr. Means that your log did not have an entry of some kind pertaining to Ms. Chilcutt's accident?

THE WITNESS: No, sir, I didn't.

THE COURT: Okay. Go ahead.

Q. (By Mr. Kerr) Mr. Svede, let me show you what has been marked as Defendant's Exhibit No. 2 and refer you to page 107 of your deposition that was given on April 22nd, 1992 and refer [21] you specifically to the question that begins on line 6 where you are asked:

> "Do you know of any claims having to do with slip and falls as a result of slippery floors with either the cause being excessive wax or some liquid on the floor that occurred in any other Fort Worth post office within two years prior to the date of this accident?"

And your answer:

> "None to my knowledge. I'm not saying there wasn't any; I just can't recall any."

And you believe that to be a true answer at the time, correct?

A. Correct.

Q. And then the question reads:

> "Where would such a record of other claims and lawsuits of that type be kept?"

And you answer:

> "The Safety Office would have anything that comes through like that."

Is that correct?

A. Yes, sir.

Q. And then the question is:

"That would be Mr. Kunkel?"

And your answer is:

"Yes."

[22] A. Yes.

Q. And then on page 114—

THE COURT: What was the last page you were looking at?

MR. KERR: It was all on 107, Your Honor.

THE COURT: Okay. I find it here. That is fine. Go on to 114.

Q. (By Mr. Kerr) Page 114 in this entire deposition is your only reference to your log, on line 16 of page 114.

In response to the question:

> "Do you have any data or any information about how many claims are denied that you investigate?"

you say,

> "It's in the reports—I mean in my log. And if there are claims filed, I have records. I believe retention time there is 3 years on those."

A. Correct.

Q. That's the only reference you have ever made prior to June 4 to Mr. Means or in Mr. Means' presence about your log?

A. Yes.

Q. Now, Mr. Kunkel—When you discussed with Mr. Means the Safety Office logs, the ones kept by Mr. Kunkel, you did that on more than one occasion, didn't you?

A. I can't recall the number of times.

Q. Well, it was—

[23] A. More than once.

Q. All right, sir.

And the question that the court asked you about earlier where you were asked what you did or what Mr. Means asked you specifically about Mr. Kunkel's logs, that wasn't the only time Mr. Means asked you to look for documents generally that might be relevant; is that correct?

A. Could you repeat that? I didn't get part of it.

Q. Yes. It was a garbled question.

You looked for documents at Mr. Means' request on at least three or four occasions, did you not, sir?

A. Correct.

Q. And Mr. Means discussed with you Mr. Kunkel's log on three occasions; is that correct, sir?

A. Correct.

Q. And when Mr. Means asked you about logs, did he tell you that he was specifically wanting to look at Mr. Kunkel's logs, or was it in the context of trying to gather information that was generally responsive to what the plaintiffs had asked for?

A. He asked on several occasions about Kunkel's logs, and he also asked about any documentation pertinent to the case.

Q. And, in fact, after you had told him that Mr. Kunkel's logs contained no reference to the Chilcutt accident or to River Bend, he asked you to arrange a meeting so he could look at the Safety Office logs; is that correct?

[24] A. Correct.

Q. And you did that with him, didn't you?

A. Yes, sir.

Q. And that was on or about May 26th, which would have been the Tuesday before the hearing on sanctions that occurred on Thursday; is that correct?

A. Correct.

THE COURT: Mr. Kerr, let me ask a question.

You said that Mr. Means asked you about any document pertinent to the case?

THE WITNESS: He did. He would go down the list. He had the requests for production. He would go down the list asking for the different documentation.

THE COURT: Okay. When he asked for any document pertinent to the case, did you not disclose at all with him that you had a log that recorded the accident, as well as other accidents?

THE WITNESS: Your Honor, the log never came to—My log never came to mind, basically, because the page that referred to the Chilcutt accident was in the file cabinet in the back. I had the case file out working on it.

The only reason I have the log and the use for it as an index or cross-reference, just to find numbers.

THE COURT: My question was: When Mr. Means asked you for documents pertaining to the accident, including documents [25] that disclosed any accidents at River—

What is it, River Bend?

THE WITNESS: River Bend, yes, sir.

THE COURT: At the River Bend facility.

Did he ask that kind of question?

THE WITNESS: I can't remember if that was the exact wording, but as we went down that was—

THE COURT: On those subjects, did he ask you questions of that kind?

THE WITNESS: About the log?

THE COURT: No. Any documents that might exist pertaining to any accident that happened at the River Bend facility, for example.

THE WITNESS: Yes, he did ask that question.

THE COURT: Including the Chilcutt accident?

THE WITNESS: Yes, sir.

THE COURT: And you're saying that you didn't even mention to him that you had a log when he said that?

THE WITNESS: It just didn't come to mind, sir.

THE COURT: You are saying you didn't mention to him that you had a log when he said that?

THE WITNESS: No, sir, I did not.

THE COURT: Okay.

Q. (By Mr. Kerr) Why did you not do that, Mr. Svede?

A. It just didn't come to mind that the log would be—I just [26] didn't have any idea that the—I had been—several times I have been working with the U.S. Attorney's Office on cases, and I have never gone this far, you know, through trial. And in all other requests for production or anything the log book or register has never come up.

So it just didn't cross my mind that would be something that would be, you know, requested. It just didn't come to mind.

Q. All right, sir. And when you were looking through Mr. Kunkel's logs, the Safety Office logs, you were there with Mr. Means?

A. Yes, sir.

Q. Did Mr. Means actually look through part of Mr. Kunkel's office's logs himself? Is that correct?

A. Yes, sir.

Q. And then Mr. Kunkel took Mr. Means and you to a storage room, and you completed or you began looking at logs that were in storage in a filing cabinet, correct, sir?

A. Yes, sir.

Q. And Mr. Kunkel did not find anything in those Safety Office logs regarding the Chilcutt case or River Bend post office?

A. No, sir.

Q. And did Mr. Means ask him at the end of the day to keep looking for those logs?

A. Yes, sir.

[27] THE COURT: Mr. Kerr, if the examination is to have a whole lot of meaning, you really need to let the witness give testimony, rather than you.

MR. KERR: All right, sir.

Q. (By Mr. Kerr) Tell us what went on in that storage room while the three of you all were looking for logs in Mr. Kunkel's safety office.

A. Basically Mr. Means and I stood over to the side while Mr. Kunkel went through the different boxes that he retained and said that he couldn't find anything.

And Mr. Means asked him if he would continue looking.

And I don't know the exact time we were in the storage room. Maybe 10 to 15 minutes.

Q. And during that day about how many people had Mr. Means met with? That means how many post office employees did you arrange for Mr. Means to meet with. Do you recall?

A. Approximately five.

Q. And then you understood that Mr. Means had already met with several others at the River Bend facility before he got to your office at 9:00 or 10:00 that morning; is that right?

A. I believe so, yes.

Q. And after you left the postal complex that day, did you speak with Mr. Means the next morning on May 27th about the documents?

A. I believe so.

[28] Q. If that was the day that you met Mr. Means at the River Bend post office and then produced the documents, do you recall any discussions with him that day?

A. I am not sure of the dates, no, sir. I can't recall.

Q. Do you remember the day you met Mr. Means at the River Bend post office after you had reviewed all of these records and then produced the additional reports to the plaintiffs?

A. Yes.

Q. And during the discussion in Mr. Kunkel's office about the logs and then the next day when you met Mr. Means there was nothing mentioned about your log.

THE COURT: Mr. Kerr, it really would be more meaningful if the witness testified rather than you.

MR. KERR: I'm sorry.

Q. (By Mr. Kerr) Did you say anything about your log on either of those occasions?

A. No, sir, I did not.

Q. Based on every contact that you had, any and all information that you had about your dealings with Mr. Means from April through the June 4 hearing, do you, sir, have any reason whatsoever to believe that Randell Means knew about the non-vehicle accident register, Court Exhibit No. 1, prior to June 4 and intentionally withheld it or tried to conceal it from production to the plaintiffs?

A. No, sir, he did not.

[29] Q. And based upon any and all of your dealings with Mr. Means through this same time period, April through June 4 of 1992, do you have any reason to believe that Randell Means refused to produce or kept that Exhibit No. 1 back because he felt that it was not responsive to what the plaintiffs had asked for?

A. No, sir. He went over and above what normal would be, I think.

Q. What do you mean by that, sir?

A. Just an extra effort. We went together looking for information and asking people if there is any other documentation. He just—I think he put an extra effort into trying to provide everything that was asked for.

MR. KERR: That's all I have, Your Honor. Pass the witness.

THE COURT: Okay. Ms. Robbins, because of your familiarity with the case as it has developed, I am going to invite you to ask any questions of the witness you might need to ask him that would clarify anything that we are dealing with.

MS. ROBBINS: I will just go through these in order. I took a few notes.

CROSS EXAMINATION

BY MS. ROBBINS:

Q. Mr. Svede, you stated April 22nd was the first time you started working on assisting Mr. Means with production of these [30] documents?

A. I can't remember the exact date.

Q. Okay. Approximately sometime in April?

A. Yes.

Q. Okay. A moment ago you were discussing some excerpts from your deposition. And I don't have the deposition in front of me, so you may need to help refresh my memory on it. But it was my recollection that I was asking you, in addition to those two examples of where you discussed the accident log about—As we went through the subpoena duces tecum, which is pretty much similar to the requests for production, we went through each one of those item by item. And, as I recall, you stated in response to one of those that you kept an accident log of your own, and that was responsive to, I believe, my request for documents having to do with the investigation of the Chilcutt matter.

Do you recall the context that I am talking about in the deposition?

A. Not offhand.

MR. KERR: Objection, Your Honor.

Actually, what he said is in the record; and, if she's going to ask him about it, I would ask her to refer to the deposition itself.

THE COURT: I overrule your objection. If you want to refer to the deposition, refer to the deposition. You can [31] refer to the exhibit.

MS. ROBBINS: Well, I don't want to take up the court's time right now looking at it. I was just asking Mr. Svede—

THE COURT: Okay. If during the course of the hearing you have time to thumb through the exhibit and find what you are talking about, that might be helpful.

MS. ROBBINS: Yes, sir.

I'll wait until I can do that before I proceed with that question.

Q. By Ms. Robbins) Mr. Svede, do you and Mr. Kunkel both office at the Management Sectional Facility?

A. We're both in the same area but not in the same building.

Q. What is the purpose of having two separate logs rather than one central log?

A. My log is basically kept for the tort claim activity. Mr. Kunkel's logs are kept for safety reasons.

Q. Is there any kind of rules or policies—For example, you mentioned a moment ago that apparently this one missed the system?

A. Yes.

Q. What is the procedure, as far as what you are required to do, in order to maintain the information; and then how does that compare with what Mr. Kunkel is required to do to maintain his log?

[32] A. Well, I can only speak for my log. I am not in the safety department, but basically my job is to investigate the claims and make recommendations on them and send them forward.

Like I say, I can't speak for Mr. Kunkel.

Q. What is it specifically—or if there are any specific written policies or verbal policies—that you operate under as far as—if you can give the steps of what you are supposed to do with respect to filling out your accident log?

A. Mr. Kunkel and I have a verbal agreement that if an accident is called in, we will—if it is called in, he'll notify me; and, if it is called in to me, I will notify him. The paperwork that is sent in, we'll send the information to each other.

In this particular case I don't know what happened. It may be based on the fact that the accident happened on one occasion and it was not reported to me until two weeks later. That could have some bearing on it. I am not sure.

Q. Since this matter came to light about the accident log at the June 4th hearing, have you had a chance to discuss with Mr. Kunkel how this accident missed the system, so to speak, as far as landing in his log?

A. We have talked about it, and he said it was just a foul-up in the system.

Q. You said the purpose of keeping your log was to record information for possible tort claims; is that correct?

[33] A. Correct.

Q. All right. And what is the purpose of Mr. Kunkel's log?

THE COURT: I think he has already said that. For safety reasons.

Is there something else you are getting at?

MS. ROBBINS: I guess I didn't get his answer.

Q. (By MrMs. Robbins) Is it something broader than your—

THE COURT: I thought you said earlier it was for safety reasons.

THE WITNESS: Correct. Yes, sir.

THE COURT: Okay. I guess she is now wanting to know what you mean by that.

THE WITNESS: He is the safety officer for the Fort Worth MSC and, therefore, anything that is safety related he keeps track of that.

Q. (By Ms. Robbins) All right. And, Mr. Svede, to clarify a statement you said a minute ago about the physical process of looking through Mr. Kunkel's accident log, I believe you said you and Mr. Means stood to the side and Mr. Kunkel went through the documents?

A. Correct.

Q. Okay. Do you know if Mr. Means actually sat down and looked through the same log that Mr. Kunkel reviewed?

A. Prior to going to the storage room Mr. Means looked through Mr. Kunkel's log in his office.

[34] Q. Mr. Kerr's question a moment ago which you responded to said that Mr. Means reviewed part of Mr. Kunkel's log.

Do you know what the part that was; and, if so, why the whole log was not reviewed?

A. That I do not know.

THE COURT: Is what is referred to as Mr. Kunkel's log available in the courtroom?

MR. KERR: It is right here, Your Honor. It is the Safety Office log.

THE COURT: Could I see that?

MS. ROBBINS: Your Honor, that's all the questions I have at this time.

THE COURT: Okay.

MS. ROBBINS: For the record, I would like to point out that your order—I believe it was the July 1st order—said that the accident log which Mr. Svede produced at the June 4th hearing was not received by plaintiffs' counsel until that day. But I still haven't seen the log, just for the record. And I don't know if it is the court's intention to have it disclosed to us or even if it is necessary. But just to clarify.

THE COURT: You mean you haven't seen the exhibit?

MS. ROBBINS: Right.

THE COURT: The Court's Exhibit 1?

MS. ROBBINS: Right.

[35] MR. KERR: I have it here, Your Honor.

THE COURT: Well, okay. That's fine. I didn't mean to imply that you had seen it on that day, but I assumed you had since it was now a public record as a court's exhibit.

Let me see what you are referring to as Kunkel's logs.

MR. KERR: Your Honor, now that you have the set of logs I think I can shortcut matters.

The long gray binder is the one that contains the time period for the Chilcutt accident.

THE COURT: Well, I am not going to study them. I just want to see the form they take.

There are a number of pages that generally are the same size and structure of the Court's Exhibit No. 1. And then there is a book that appears to have something in it, and I am not going to take time to go through that.

EXAMINATION

BY THE COURT:

Q. Mr. Svede, when did you first remember that you had this Court's Exhibit No. 1 log?

A. It wasn't—It wasn't forgetting about it. The first time it was brought up was the morning of June 4th when Mr. Means' secretary called and said that we were scheduled in court at 2:00 p.m. that afternoon.

And I can't recall if this secretary mentioned it. I believe just a short time later Mr. Means called, 30 to 45 [36] minutes later, and he said bring your logs, Kunkel's logs and everything else you have in the case. Bring it with you to my office. That was the first time Mr. Means mentioned the log and the first time the log just came to light.

Q. The first time Mr. Means had ever asked to see your log?

A. Yes, sir.

Q. That is the first time you had had any discussion with Mr. Means about your log? And I'm talking about this Court's Exhibit 1. Is that the first time you ever had any discussion with him about it?

A. Yes, sir.

Q. Now, you say that you had not forgotten it earlier. Maybe I misunderstood.

When you were asked questions by Mr. Means in April or whatever it was when he was seeking to obtain information about Ms. Chillcut's accident, did you forget at that time that you had a log that recorded her accident?

A. Well, I used the log on a daily basis. Like I said, it is a cross-reference.

Q. Did you forget at that time that you had the log recording her accident; that is, that her accident was reported in the log?

A. I really didn't have to have the log to look up her accident since I was working the case, anyway, and the case file was out. That is the only reason I use the log book, is [37] to look up the file number.

Q. Maybe you can help me again on something I apparently misunderstood earlier.

When Mr. Means was seeking information about Ms. Chilcutt's accident, why did you not at that time show him your accident log?

A. It just didn't come to mind.

Q. So you forget about it?

A. Yes, sir.

Q. That is what I thought you said.

When did it first come to your mind that Ms. Chilcutt's accident was recorded in that log?

A. At the phone call from Mr. Means on June 4.

THE COURT: Okay. You can step down. I would like for you to stay until the hearing is concluded, in case anybody else wants to ask you a question.

MR. KERR: We will call Mr. Means at this time, Your Honor.

THE COURT: Okay.

Let's see. I don't believe Mr. Means has been sworn.

(Witness sworn by the court.)

THE COURT: Okay.

RANDELL MEANS,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

[38] BY MR. KERR:

Q. State your name, please, sir.

A. Randell Means.

Q. Mr. Means, when were you licensed to practice law?

A. November the 12th, 1979.

Q. Mr. Means, how long have you been actively practicing in the courts in the Northern District of Texas?

A. Since I joined the U.S. Attorney's Office in January of 1987. I believe I was technically admitted to the district prior to that.

Q. Now, Mr. Means, based on what you know sitting in the witness stand today, how many different logs or sets of logs were maintained out at the post office complex on the north side in April and May of 1992?

A. There are two different sets.

Q. When did you first learn about the set that was kept in the Safety Office?

A. During the deposition of Al Svede when he referred to it in response to some questions from the plaintiffs' lawyer.

Q. And, sir, what discussion after that deposition did you have with Mr. Svede about the Safety Office logs?

A. I requested him to check the logs to see if there was any reports of any accident on the premises at the River Bend post office.

Q. And what did he tell you?

[39] A. Afterwards, after that, he later told me that those logs had been checked and that there was no report of any accident on the premises, anything to do with the premises or any complaint at all in terms of an accident at River Bend.

Q. Mr. Means, how many discussions did you have with Mr. Kunkel, approximately, about producing documents responsive to the specific requests the plaintiffs made?

A. You said Kunkel.

Do you—

Q. I mean Mr. Svede. I am sorry.

A. All right.

Including telephone calls, 10 or more. I know that we talked face-to-face before his deposition. We met after that a second time. I know we met face-to-face, I guess, three or four times.

Q. So the answer to my question is 12 to 14 conversations?

A. Yes, sir.

Q. And you didn't find out or didn't see—either one, both—didn't find out about it and didn't see Exhibit No.

1, Court Exhibit No. 1, until shortly after noon on June 24; is that correct?

A. On June the 4th.

Q. June the 4th. I'm sorry.

Is that correct?

A. Yes, sir.

[40] THE COURT: Again, it might be helpful if you let witnesses testify, rather than you testify.

Q. (By Mr. Kerr) Had you ever discussed the—What discussions had you had, Mr. Means, about that accident log with Mr. Kunkel or with Mr. Svede?

THE COURT: Which accident log are you referring to now?

MR. KERR: Court's Exhibit No. 1.

THE COURT: Okay.

Q. (By Mr. Kerr) What discussions did you have with Mr. Svede prior to June 4 about that log?

A. I had never had any discussion with him prior to that day about this log because I didn't know he had this document. I had had discussions with him about the accident logs that the post office had over and over.

THE COURT: Which one are you referring to, the one Mr. Kunkel had?

THE WITNESS: The ones that we now refer to as Kunkel, yes, sir. I thought that is all there was.

MR. KERR: Your Honor, if I could hand up a chronology that we put together just as an aid to the court.

THE COURT: Okay. Let me be sure I understand what you are saying.

Until noon on June 4, sometime during the noon hour, you thought the only log the post office kept relative to accidents [41] was the log that Mr. Kunkel kept?

THE WITNESS: Yes, sir. It was in that Safety Office, yes, sir.

THE COURT: And you had no idea before that time; that is, during the noon hour on June the 4th, that Mr. Svede might have an accident log that he kept?

THE WITNESS: No, sir, I did not.

THE COURT: Okay. Do you want to hand something to me?

MR. KERR: Yes, I do, Your Honor.

THE COURT: Why don't you mark that as an exhibit?

Do you have an extra copy you can mark?

MR. KERR: I do.

THE COURT: Why don't you mark it as--What designation are you giving the exhibits?

MR. KERR: I was calling them Means exhibits.

THE COURT: Okay. This will be Means Exhibit 2?

THE WITNESS: I believe 2 was used a minute ago, Your Honor. I'm sorry.

THE COURT: Okay. This will be 3, then?

MR. KERR: This will be 3.

THE COURT: Were you present when Mr. Svede gave his deposition? I haven't looked at the—

THE WITNESS: Yes, sir.

THE COURT: Okay.

[42] Q. (By Mr. Kerr) Mr. Means, you are aware that the plaintiffs filed their motions for sanctions and to compel production on May 19th; is that right?

A. Yes, sir.

Q. What did you do in response to that motion for sanctions?

A. I reviewed it and prepared a brief response that was filed on May the 22nd.

Q. Did you give them any more documents?

A. There were—Yes, sir. I finished some more collection of documents that we had been trying to work on since the deposition, and those were produced, as well, on May the 22nd at a conference that we had there at the U.S. Attorney's Office with the plaintiff.

Q. The answer is yes, correct?

A. Yes, sir.

Q. Did you produce Al Svede's log?

A. No, sir.

Q. Why not?

A. I did not know there was one.

Q. Now, Mr. Means, Mr. Svede had testified on page 114 of his deposition—or he had made a reference to "my log." It's page 114 of Means Exhibit No. 2. Is that correct?

A. Yes, sir.

Q. And you have read that deposition?

A. Yes, sir, at some point. I am not certain when.

[43] Q. And why, in view of Mr. Svede's comment about his log, were you not aware that Mr. Svede or did not think that Mr. Svede had a log that was separate from these Safety Office logs that we have in the courtroom?

A. At the point of the deposition I just didn't understand him referring to anything different than the further safety logs he explained in more detail in the deposition.

And then along with that I talked to him over and over about safety logs and checking logs, and all we ever talked about and all he ever told me about was the logs in the Safety Office. So that's all I thought there was.

Q. Okay. In view of your conversations with him, his reference to "my log" in his deposition, what did you think that meant?

A. I thought he was talking about the log of the post office as an entity, and that was the one that was kept in the Safety Office that he had access to.

Q. And then on May 22nd the court heard the motion for sanctions and to compel production of documents. Of course, you were here and understood at the end of that time or the end of that hearing that the court had ordered you to try to find any and all documents that could possibly be responsive and to submit some sort of verification about your efforts in that regard and what you could and couldn't find and what you produced; is that correct?

[44] A. Yes, sir.

Q. What did you understand to be the primary complaints or omissions as discussed in that hearing on May 22nd?

A. Plaintiffs' counsel was primarily complaining about whether or not we had produced everything about the

complaint system or the complaint procedure they had through the post office which dealt with these complaint cards that the system used for customer complaints, and she was—

Q. Just briefly, Mr. Means, so we don't repeat things.

A. I'm sorry.

And any documents that went along with that, any sort of internal correspondence the post office had in relation to any complaints like that.

Q. What else?

A. A log for the accidents for each individual post office unit.

Q. Let me stop you right there.

What had you told the plaintiffs about their prior request and the request this day for logs for each post office unit?

A. That there is not a log kept for each individual post office location, like the River Bend premises does not have its own separate log.

Q. And are you absolutely sure that is correct?

A. Yes, sir. That is everything I have been told even to this day.

[45] Q. And you also, did you not, discussed—Well, what else did she ask you about in that hearing?

A. She reiterated the request she made during the deposition about Svede's information on other slip-and-fall accidents that he had. So we were to produce the 495's, which is the claim made, and the postal responses to that.

Q. Was there any specific question about producing Al Svede's log, as opposed to other logs that you had already reported on?

A. No, sir. She only made the point about—was consistent she thought there was a log for each physical location or facility.

Q. What did you do after the hearing, Mr. Means, to comply with the court's order?

A. After I left the court I first called Al Svede at his office.

Q. What did you tell him?

A. I explained to him the hearing that had taken place, the court's orders. And we then began there on the phone. I walked him through line-by-line the production requests, and we went over that again.

Q. How many times had you gone over that previous to the conversation you had with him that day?

A. I had gone over the documents and things that the plaintiffs wanted at least twice in person prior to then and probably various discussions about different bits and pieces on [46] the telephone.

Q. So the answer to my question is two or three times?

A. Yes, sir, at least.

Q. Mr. Means, in that conversation with Mr. Svede on the 22nd, what else did you say to him, briefly?

A. That I needed to come to the post office and try to deal with all of these people directly just to emphasize what I understood from the court and go over those production requests to explore and make sure we didn't miss anything, and that I was going to have to verify and certify to the court what I had done to locate these records. So that I needed to be involved and do that, and he was going to arrange these meetings for me.

Q. Meet with what people, post office employees?

A. Yes, sir, employees at the main post office with responsibility in the various areas that were covered by the production requests.

Q. Including Mr. Kunkel?

A. Yes, sir.

Q. And why did you ask to meet with Mr. Kunkel?

A. Because I wanted to verify and reconfirm the issue about the safety logs and whether or not there was anything that had been overlooked in any of these records that they had told me they had looked at before.

Q. In this conversation, as well as the prior conversations when you were asking Mr. Svede about the logs, how did you [47] phrase that question?

A. I was talking about we needed to look at the accident logs.

Q. Did you say "Mr. Kunkel's logs"? Could you have said that?

A. I probably did, since I believe at that point—or I could have—since I believed by then I knew they were in his office.

Q. And you worked over the weekend, is that correct, sir, and then started interviewing post office employees on Tuesday?

A. Yes, sir.

THE COURT: Let me be sure I understand what you are saying.

You never asked Mr. Svede what his log might show?

THE WITNESS: No, sir.

THE COURT: Because you say you didn't even know he had a log?

THE WITNESS: That is correct.

THE COURT: Okay.

Q. (By Mr. Kerr) Mr. Means, what did you start with in your interview process on Tuesday, the 26th?

A. The first interview was Mr. Svede where we did the face-to-face—What we did on the phone was we started that again and went down the production list.

Q. What did you tell Mr. Svede in that conversation?

A. I again emphasized to him the court hearing, that the court was not happy. We needed to make sure we didn't miss anything.

[48] I also explained to him what the plaintiff had indicated—that she was insisting there were documents that had been created we had not produced. And I explained that to him to emphasize that and to make sure that—I pointed that out to him to see if there was anything that we hadn't shown.

Q. Did you arrange to meet with other people?

A. Yes, sir. That was already planned.

Q. Did you do that, meet with other people?

A. Yes, sir.

Q. Did you meet with Mr. Kunkel in the Safety Office?

A. Yes, sir, later that morning.

Q. Tell the court what you did in that office.

A. First with Mr. Kunkel and Mr. Svede we went over production requests that might be any documents that Kunkel would be aware of for safety-related investigation issues, and he helped us and looked at all possible publications he could think of that he had, was aware of, and he provided me some books. And then we moved on to the logs.

Q. What did you do with regard to the logs that day?

A. I believe we first went to the storage room and started looking at the logs that were stored there in his file cabinets. It was a very tight space, and I stood behind him.

Then at some point we broke from that and went back to his office.

Q. Okay. Let me ask you: When you were in the storeroom why [49] was he looking at the logs rather than you looking at the logs?

A. Because it was his records, he knew what to look at, and there physically wasn't space for me to stand behind him and do it.

Q. How far away from him were you?

A. Probably three feet directly behind him.

Q. What did you talk about while you were in the storeroom?

A. What he was looking at.

Q. What was he looking for?

A. He was looking at the zip code for the individual complaints on each line to try to identify where they were. We were talking about the possibilities of mistakes in the zip code notation.

So he was looking at different ways that the zip code numbers could be transposed. and anything that was close he would stop and look at the full reference to see if it was the address of the location.

Q. All right, sir. When you finished in the storeroom and went back to his office, had you found anything about River Bend or Chilcutt?

A. No, sir, not a thing.

Q. What did you do when you went back to his office?

A. He had a separate second book that I understood was strictly employees, and I stood over his shoulder with him and looked down that list to see if there was any employee-type [50] complaints or accidents or reports for the River Bend location. And we did the same thing in looking at zip codes and addresses.

Q. How did you leave it with Mr. Svede that day and Mr. Kunkel with regard to the logs?

A. It was late in the day, and Mr. Svede was going to—excuse me—Mr. Kunkel was going to go back and complete the storeroom examination of the logs and would either finish it that afternoon or early the next morning and report to Mr. Svede.

Q. At any time during that day when Mr. Svede was with you in Mr. Kunkel's office looking at those records did Mr. Svede ever mention his log, the pages of which have been marked as Court's Exhibit No. 1?

A. No, sir.

Q. Did you ask him?

A. No, sir.

Q. Why did you not ask him?

A. I didn't know to ask. I thought—

Q. Mr. Means, he mentioned it in his deposition. Why didn't you ask him?

A. That reference that he made in his deposition that I have now gone back and looked at did not register on me at the time during the deposition as being anything different or separate from the safety logs in the Safety Office. I just did not [51] understand or focus on him having something separate by that reference.

Q. And then the next morning on the 27th, Mr. Means, did you talk to Mr. Svede?

A. Yes, sir.

Q. What did he tell you?

A. He advised that Kunkel had finished the checking and that he had checked everything that there was and that there was no report at all for any accident at River Bend. And it was the day before while I was there personally that we verified that during the time period of the Chilcutt incident that it didn't even show up in the records.

Q. And then did you meet with Mr. Svede that morning?

A. Yes, sir.

Q. What did you do in that meeting?

A. I believe I met him also that morning at the main post office, and we checked with a couple other folks, did some last-minute double checking on documents. And then I met with him later in the afternoon at the River Bend location to travel to the plaintiffs' office for the production.

Q. And that meeting was on Wednesday, May 27th?

A. Yes, sir.

Q. And that same afternoon of Wednesday, May 27th, you filed what you called your affidavit of compliance verifying to the court the search you made and the results of your search; is [52] that right, sir?

A. Yes, sir.

Q. Mr. Means, to the best of your knowledge, information and belief, at the time you submitted your response to the requests for production of documents and your two affidavits of compliance, did you believe that those statements in those pleadings were true and correct in every respect?

A. Yes, sir, I did.

Q. And was that representation based on knowledge, information and belief from the inquiry that you had made—

THE COURT: Why don't you left [sic] the witness testify?

MR. KERR: I'm sorry.

Q. (By Mr. Kerr) Mr. Means, why did you make the statements to the court in those pleadings that you made, that there was no log that was responsive?

A. Because we had checked those logs. I had participated and asked him over and over about any records we had. And in all of the searching he and I had done together in going through those specific logs, the only logs there were, the verification was that there was no information in there that was responsive.

So there was nothing to produce, and I reported what I believed to be true based on all the checking I had done.

Q. Mr. Means, would you have produced Court's Exhibit No. 1, had Mr. Svede shown that to you or mentioned it to you in any of your conversations or discussions?

[53] A. I think so, yes, sir. I can't see—

Q. I'm sorry?

A. I can't see any reason why it could not be produced.

Q. On Monday, June the 1st, the plaintiffs filed their supplemental motion for sanctions.

Is that your recollection?

A. Yes, sir, that is right.

Q. Did you read that supplemental motion for sanctions?

A. Yes, sir.

Q. Now, did you see the specific comments in the supplemental motion regarding Mr. Svede's log?

A. Yes, sir.

Q. And, again, did you file a response to the supplemental motion for sanctions?

A. Yes, sir, I did.

Q. And, again, what did you tell the court and why about Mr. Svede's log?

A. I referred again that the logs had been checked, and I cited back to other areas in the record. I believe the language I used was reiterating or referring to the

checking that had been done of the logs and the verification that there was no entry in there that was responsive. And that as a result of that there was nothing to produce and, therefore, no violation of any discovery order.

Q. But on what basis did you make those representations to the [54] court?

A. Based upon all the checking I had done with Mr. Svede and all of the conversations I had had with him and Mr. Kunkel and everybody else at the post office, going through all of these records and asking for whatever we had.

Q. Now, it turns out you, of course, were wrong about whether Mr. Svede had a log or not.

You understand that, Mr. Means?

A. Yes, sir.

Q. When did you realize your error?

A. When he brought it to my office the afternoon of June the 4th.

Q. Now, prior to June 4th, did you intentionally withhold or conceal the production of those pages that are marked Court's Exhibit No. 1?

A. Never, no, sir, I did not.

Q. Did you ever discuss with anyone, anyone, that those pages needed to be withheld because they were not responsive to what the plaintiffs had called for?

A. No, sir, I didn't discuss them at all.

MR. KERR: I will pass the witness.

THE COURT: Let me ask you a few questions, and then I am going to let Ms. Robbins ask some questions, if she would like.

EXAMINATION

[55] BY THE COURT:

Q. Let me get the sequence of events in my mind.

Mr. Means, after the May 22 hearing you made inquiry to develop documents of a kind that you were to produce or your client was to produce pursuant to the requests for production?

A. Yes, sir.

Q. And in response to, for example, item 28 of the requests for production—First of all, you do recognize that item 28 of the requests for production calls for, among other things, the accident log Mr. Svede kept?

A. I recognize that now, yes, sir.

Q. Okay. Your response to that request was that no such thing exists. Is that correct, "There are none"?

A. Yes, sir, I believe that is right.

Q. And then, in keeping with my order that you verify the things you did to determine the accuracy of your response, you gave a declaration—

A. Yes, sir.

Q. Let me see if I can find that.

—called an affidavit of compliance.

And then the verification related to request No. 28, you repeated, "There are none"?

A. Yes, sir, in the affidavit of compliance.

Q. And then as your contact, the person from whom you gained the information that there were none, "You said the same as No. [56] 27 above"?

A. Yes, sir.

Q. And then No. 27 above gave as your contact Al Svede, accident investigator?

A. Yes, sir. That was one of the contacts.

Q. And you made that declaration under penalty of perjury?

A. Yes, sir.

Q. And then the supplemental motion for sanctions we filed by the plaintiff on June 1, 1992?

A. Yes, sir.

Q. And on page 11 of that, one of the complaints the plaintiff made was, "Additionally, Al Svede testified in his deposition (at page 108, line 6) that Mr. Kunkel has a log that keeps all accidents, vehicular and non-vehicular. Defendant has never produced this log."

Do you see what I'm talking about?

A. You said Kunkel there.

Q. Yes. On page 11 of the supplemental motion for sanctions.

A. Oh, I'm sorry. The motion.

MR. KERR: Your Honor, if I may hand that up.

MR. MEANS: I have it.

Q. (By the Court) The first paragraph that starts with the word "additionally."

Do you see that paragraph?

A. Yes, sir. Yes, sir.

[57] Q. It says, "Additionally, Mr. Svede testified in his deposition (at page 108, line 6) that Mr. Kunkel has a log that keeps all accidents, vehicular and non-vehicular. Defendant has never produced this log."

Do you see that?

A. Yes, sir.

Q. And then the very next paragraph is, "Additionally, Al Svede testified in his deposition (at page 114, line 16) that he keeps a log, which, among other things, would contain information relating to types of claims and their disposition. Defendant has never produced this log."

Do you see that?

A. Yes, sir.

Q. Now, that was in a document that you received from the attorney for the plaintiffs on June 1, 1992?

A. Yes, sir. I believe that's when I got it.

Q. You clearly understood at that time that there were two different logs, didn't you, one that Al Svede kept, which he had mentioned on his deposition as a separate log, and the one that Mr. Kunkel kept?

A. No, sir.

Q. You didn't understand those words?

A. I understand the words of what plaintiff was saying. I understood that is what she thought.

Q. But you didn't think Mr. Svede kept his own log?

[58] A. No, sir.

Q. Okay. Let's go to your response to that plaintiffs' supplemental motion.

You filed a response to that on June 3, 1992?

A. Yes, sir.

Q. Okay. Why don't you refer to page 23, approximately the middle of the page? This is directed to the complaints the plaintiff had made about failure to produce logs.

It says, "Plaintiff further complains of the failure to produce the accident log maintained by Robert Kunkel that relates to complaints or communications from customers in regard to the condition of the River Bend Post Office as a possible accident cause since 1978. As cited above herein in response to Request No. 13, the log maintained contains information from the years 1987 through the present, and no other log record exists for any other time periods. In accordance with the request for this accident log, which was expressly limited by plaintiff to any reports of accidents strictly dealing with the River Bend Post Office and something having to do with the floor, whether in public or employee areas, as fully set out above in response No. 13, Robert Kunkel, Safety Manager, Fort Worth, MSC USPS, conducted a search of the complete logs for both employee and customer complaints and found none to exist. As noted above herein, defendant failed to describe the details of this log search in [59] defendant's affidavit of compliance to plaintiffs' request for production of documents and things. There being no log with any information of the kind requested, there is no violation shown to the orders of the court."

Now, that is a statement you made on pages 23 through 24 of your response that you made on June 3, 1992?

A. Yes, sir.

Q. And then the immediately-following paragraph on page 24 of that response, you go on to say, "Plaintiff further complains that Al Svede has not produced his own log relating to the same subject. Defendant has certified, and based on the answer provided by Al Svede, that there is no record of any complaint of the type sought by plaintiffs' request. There being no information of the type sought as established by a complete search of the proper records of defendant and certified answer of defendant, there is no violation of this court's orders shown."

Do you see that?

A. Yes, sir.

Q. What were you referring to when you referred on June 3, 1992 to Al Svede's own log?

A. I was referring to the same search that had been conducted of the same safety logs.

Q. Okay. You have two paragraphs, one you clearly made reference to Kunkel's log, and then the next paragraph you [60] start out by referring to Al Svede's own log.

What were you referring to, Mr. Means?

A. Well, as I was trying to say, Your Honor, I was referring to the same logs and referring to the same certification that I had made based upon what Al Svede had told me of the checking of the logs. And that's—

Q. You mean when you used the words Al Svede's "own log," you are referring to Mr. Kunkel's log?

A. When I used the phrase "own log," I am quoting her complaint.

Q. Where is the quotation mark?

A. It's not quoted, Your Honor. I state that, "Plaintiff further complains that Al Svede has not produced his own log." I am repeating without quotations the complaints she makes.

Q. Where is it in her pleading, her motion, that she used the words "own log"?

A. Referring to page 11, the paragraph the court cited me to a moment ago, that reads, "Additionally, Al Svede testified in his deposition that he keeps a log."

Q. Were you alerted by the complaint the plaintiff made on June 1, that the defendant had not produced Al Svede's log, that there was such a log at that time?

A. No, sir, I did not know that he had his own log at that time.

Q. Did you make any inquiry at that time to determine whether [61] he did, bearing in mind that the plaintiff had complained on that date about your failure to produce it?

A. No, sir, I did not on June the 1st.

Q. Did you at any time thereafter make any inquiry to determine if there was such a log?

A. No, sir, I never asked him that question directly.

Q. Now, in the discussion, something that is not reflected in the content of my July 1, 1992 order, that precedes the quoted material on page 4 Ms. Robbins makes reference on page 45 of the transcript of the June 4th hearing. This is the morning session. "Mr. Svede testified that he had an accident log he kept and also the Fort Worth facility maintains an accident log."

Did you understand at that point that there were two different logs involved?

A. I understood that's what she was convinced there was. I did not understand that there really was anything that Mr. Svede had. I understood she was operating under that assumption, based on how she had read some regulations before and what she was continuing to say.

Q. And it was following that reference that you said, "I am stating under oath before the court as an officer of the court that my representations in that motion are correct"? That referred to your response to the plaintiffs' motion for sanctions? Is that what that referred to?

[62] A. Yes, sir, I believe so. I replied—

Q. Okay.

A. If we are talking about—I have the deposition in front of me. We are talking about page 50? I believe that's . . .

Yes, sir.

Q. And then you went on to say that what you were telling the court under oath is that a search of that log has been conducted and no accident has been identified—I believe it's 1987 through the present—for the premises at River Bend Finance Unit for both employee accidents and complaints of customer accidents?

A. Yes, sir.

THE COURT: Okay. Do you have anything, Ms. Robbins, that will help clarify, any questions that you think will help clarify where we are?

MS. ROBBINS: No, sir, I don't.
MR. KERR: May I redirect, Your Honor?
THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. KERR:

Q. Mr. Means, referring to the supplemental motion for sanctions that was filed on June 1 and received by you, and specifically page 12 where there is the reference that Al Svede testified in his deposition that he keeps a log, you said you were not alerted to the fact that at that point after you got [63] this document that there were two logs; is that right?

A. Yes, sir. I mean, I didn't—

Q. Why? Just answer my questions. Why?

A. I didn't recognize that as being the case. I understood from all the searching and everything I had done I knew about the only log that existed.

Q. So when you tell the court on page 4 of the transcript that you have searched the log or that there is no log, what log are you referring to?

A. I'm talking about the accident investigation log that's kept at the Safety Office; that we had checked, and there were no entries at all. So there was no log entry, nothing to produce. And there was none, which is what I was referring to.

Q. When you had looked at that log, Mr. Svede was with you and didn't say anything about his log; is that correct?

A. That is right.

Q. Mr. Means, why did you not make an inquiry after you got plaintiffs' supplemental motion for sanctions that was filed June 1 and received by you on June 1, an additional inquiry of Mr. Svede or Mr. Kunkel or anybody else, about the log?

A. Because I had already completed the full search with him of all the logs, and we had talked over and over

about is there anything else we are missing, anything we are forgetting, any other documents we are not finding. And I thought I knew the answer to that question at that point and didn't need to.

[64] Q. Mr. Means, what questions, in words or in the substance of the question, if any, did you ask Mr. Svede over this period of time that would have covered or called for his log, Exhibit No. 1?

A. I always referred to it as just I need to look at the accident logs. And maybe at some point, after it got to Kunkel's office, maybe I referred to it that way to where we need to go physically. I always asked him about any other documents we have got. I repeated to him about the claim the plaintiff was making, that the plaintiff had filled out documents and given to him and was convinced that that had happened. And I asked him about that over and over to verify if there was anything else he had forgotten about. And several times I talked about is there anything else we have anywhere else? What can we look at? We have got to make sure we don't miss something. That sort of comment.

Q. All right. I am talking specifically about after June 1 what kinds of questions were you relying upon to make the statements that you made after June 1 regarding the logs.

A. I was relying on all the discussions I had had with him prior to that time, primarily the full search and talking and extra work we had done on the 26th throughout the post office and all the different people we talked to and then when we worked together on the 27th and produced the documents.

Plus on top of that the other discussions I had had with [65] him prior to that extra search under the court's orders.

Q. Mr. Means, let me direct you to some of Ms. Robbins' comments that are recorded in the court's order of the July 1 order and from the June 4 transcript where she asks for Mr. Svede's log.

It turns out she was right, is that correct, there were two logs?

A. Yes, sir.

Q. Did you think she was on the right track when she made those statements?

A. Not at the time, not before I—

Q Why?

A. Before I saw it I didn't think it existed, and I thought the only thing that did exist was the one set of logs I had looked at, that I had seen and been told about in the Safety Office. And I thought she was just insisting that there was something there that wasn't.

Q. Had, in fact, she done that with regard to some other items of discovery in this case?

A. Yes, sir. And with these logs, too. She had gotten it—read a regulation wrong as to—

Q. Specifically, what are you talking about?

A. She cited at one point—I think it was—

Q. Talking about the logs at the post office?

A. Yes, sir.

[66] She made a reference to a part of a regulation or a part of a manual that says each unit or MSC or branch should maintain an accident investigation log, and she had been citing that as support for her claim that there should be a log separate to that address of the River Bend facility.

But the issue, what that regulation says, when it says "MSC," that's the main post office for this area. That's the log that they maintained at the Safety Office, which was in proper compliance with that provision of the manual. And that there was not any other log that they had to keep because they had one in compliancewith that manual at that main office, and that's the one we looked at.

MR. KERR: I will pass the witness, Your Honor.

THE COURT: Okay. Ms. Robbins, do you have anything else you want to ask?

MS. ROBBINS: Just one.

CROSS EXAMINATION

BY MS. ROBBINS:

Q. You stated that you never discussed the possible existence of two logs with Mr. Means until June 4th?

THE COURT: You mean with Mr. Svede?

MS. ROBBINS: I'm sorry.

Q. (By Ms. Robbins) With Mr. Svede?

A. No, ma'am. I did not—I discussed the logs, but I did not know—

[67] THE COURT: Just answer her question.

THE WITNESS: I believe the answer is I did not discuss a second log with him until I am saw it on June the 4th.

Q. (By Ms. Robbins) Okay. And once you received the plaintiffs' supplemental motion for sanctions, I believe, on June 1st, did you show this document to Mr. Svede, knowing that a hearing would be held and everything may be on the line in this case? Did you physically show him the document so he could read each item to help you comply?

A. Did I show him your supplemental motion?

Q. Yes, sir.

A. No, I did not.

MS. ROBBINS: Okay. Thank you.

THE COURT: Okay. You can step down.

You can step down.

THE WITNESS: Yes, sir, Your Honor. I was trying to.

MR. KERR: That is all we have, Your Honor.

THE COURT: Okay. Do you have any statement you want to make beyond what you have already said?

MR. KERR: Yes, Your Honor, if I could take less than 10 minutes to try to sum up.

THE COURT: Okay.

Your Honor, I think the uncontroverted evidence in this case is that Mr. Means should not be subjected to a show-cause [68] hearing for criminal contempt because of Al Svede's testimony.

He candidly, I think, and compellingly confirmed that Mr. Means did not have Court Exhibit No. 1 until shortly after noon on June 4. He didn't even know about Exhibit No. 1 to hide it, and that he made no effort to conceal or suppress that document.

Second, Your Honor, Mr. Means did not violate Rule 11 or the local rules of this court when he signed and filed his affidavits of compliance, when he signed and filed his response to discovery requests and made his statements to the court that have been recorded in the transcript, because he believed—and he more than believed; was convinced. Otherwise, he wouldn't have made those kinds of statements—of the truth of the statements.

And, more importantly, far more importantly, whether he subjectively believed them or not, he had good reasons to believe them.

And here's the guts of it.

He reasonably believed that Al Svede's log didn't exist because of all the conversations he had had with Al Svede who told him there's no reference in the post office logs, the Safety Office logs, the logs in general, about River Bend or any of the Chilcutt accidents specifically.

Now, it's very important that Mr. Svede, not only talked to Mr. Means, but went to Mr. Kunkel's office to look at the [69] Safety Office logs which Mr. Means understood to be the only logs.

Mr. Svede went with Mr. Means, visited with Mr. Kunkel, and Mr. Svede was the man who had been questioned three or four times about the specific items in the discovery requests, had helped Mr. Means arrange the meeting with Mr. Kunkel and with other people, participated in the review of the logs in Kunkel's office, and confirmed on May 26th and again on May 27th that everything that was possibly responsive had been produced. There was nothing else.

Now, the only item of information prior to June 1, prior to the day on which the supplemental motion for sanctions was filed, the only hint that Mr. Means could have known about Al Svede's log, was the three or four

words from the one line of his 120-something-plus-page deposition.

Your Honor, he also testifies from the lines we read that the only information, in his view, would be contained in Mr. Kunkel's log. And that is what we read out of Defendant's Exhibit No. 2 on page 7, I believe.

Your Honor, it is easy to see, I believe, how, in view of all of these conversations, Mr. Means truly believed that Mr. Svede's reference in that one spot of the deposition to my log meant the post office logs, especially after all of the contact he had with Mr. Svede where Mr. Svede didn't say a word about the documents that Mr. Means was seeking.

[70] Now, after June 1 where the plaintiffs' pleadings do specifically refer to Al Svede's log, Mr. Means, I remind you, had just been out at the post office, I guess, six days prior to that or five days prior to that and completed his discovery. He didn't, as Ms. Robbins points out, take that supplemental motion for sanctions and give it to Mr. Svede.

In view of everything else that had been done and collected and all of his prior conversations, I don't think that's unreasonable because he said to Mr. Svede on two occasions, look, they think we are not giving them everything. The court wants me to be sure that we have everything. The court is upset, the plaintiffs' counsel is upset. Give me everything.

And Mr. Svede had given him everything but failed to give him the log.

Your Honor, I think it's also understandable that Mr. Means took this position because there had been other things like this post office log for each unit and like this correspondence that—or, rather, interview or affidavit that Mr. Svede allegedly took from the plaintiff where those documents didn't exist, either. This was just one more document that she was asking for that didn't exist.

There was no intent or malice at all to conceal this document. I think Mr. Svede is perfectly candid and

bravely tells you it just didn't occur to him. It was rolled up in the back of his filing cabinet.

[71] Now, Mr. Means may be guilty of two things, Your Honor. And one of them is that he was late in his discovery responses. And I am not here to reargue that motion. That's water under the bridge that's already been done. I am only going to say that Mr. Means and his client have been assessed a punishment and a sanction for that. But, Your Honor, being late on discovery in one case, especially when the sanction has already been issued to rectify the harm, doesn't make Mr. Means incapable or unsuitable or unqualified to continue to practice in this court and shouldn't subject him to further sanctions.

Secondly, Your Honor, I think Mr. Means, likewise, shouldn't be sanctioned or barred from practice in this court or subjected to a show-cause hearing because of his second transgression, which I alluded to in my opening remarks. That second transgression is making a shoot-from-the-hip argument when, as I said earlier, he learned of the document an hour-and-a-half or so before he came in that he had already told the court didn't exist. And he told the court it didn't exist because of what Mr. Svede had told him.

Now, those two faults can be cured by experience, I think. In large measure they have already been cured by the experience in this case. Mr. Means realizes that he made those statements to the court, and they were not particularly good arguments, I believe. I think we will all acknowledge that; that the argument that these documents aren't within the call. I don't [72] know why he did it. The only excuse he has got is that he panicked.

And, Your Honor, that one item of panic shouldn't disqualify a personal from practicing in this court, and it shouldn't subject him to further sanctions. He didn't lie.

He might should have gone after June 1 and asked Al Svede directly, Mr. Svede, for the first time they are now saying—they are now saying for the first time, after all these hearings, that you have got a log separate and apart from that.

I wish—You know, if I had of been in Mr. Means' shoes, I wish I would have had the presence of mind to have done that. I hope I would have. But the fact that he did not do it is understandable. It would not be understandable in most circumstances. It truly wouldn't. But in this case it is because he spent so much time, asked so many questions, and spent so much thought in trying to get with Al Svede and get these documents produced. He was shown the logs, and he had no reason to believe that the logs he was shown were not the only logs in the post office.

For those reasons, we respectfully request that the court relieve Mr. Means of a show-cause hearing for contempt in this matter; let him get on with his practice in this court; and, with more experience, be a very valuable member of the U.S. Attorney's Office and this court.

THE COURT: Thank you.

[73] Okay. Let me state some initial reactions.

One of two conclusions has to be reached: Mr. Means either is totally incompetent as an attorney, or he made blatant misrepresentations to the court. Only one of two conclusions can be reached.

We start with a delay of approximately 30 days before he even, according to what I am hearing now, starts working on the response to discovery requests which required that the responses be made in 30 days. They still had not been made at the time of the hearing, which was held 30 days thereafter. That's a starter.

And, as you pointed out, Mr. Means has been—actually hasn't been sanctioned for that. He has been ordered to pay the attorneys' fees of opposing counsel for that. And I believe that is the subject matter of an appeal, if I am not mistaken.

But that is only the start.

At the May 22 hearing I could not have made it any plainer to Mr. Means that I wasn't going to tolerate any further discovery abuse by the government and that I expected there to be a full disclosure. I couldn't have made it any clearer.

I confirmed it by saying that I wanted it verified by an affidavit that he had made an appropriate inquiry and that his response to the discovery—or the defendant's response to the discovery was being made in an appropriate way and that full [74] discovery was being had, bearing in mind at this point in time that the accident log by Mr. Svede had been mentioned on a deposition. But we'll put that aside for a minute.

I get an affidavit or a declaration signed by Mr. Means under penalty of perjury saying that it's true and correct telling me that there is no document of a kind—that this accident log doesn't exist, is what he told me. He told me that he got that information from Mr. Svede. And that was said by Mr. Means under the penalty of perjury for me to rely on.

And then on June 1 it was again specifically called to Mr. Means' attention that there were two accident logs—there was a Kunkel log and there was a Svede log—by the supplemental motion that the plaintiff filed, and she pointed out that neither had been produced.

Now, if Mr. Means were to be given the benefit of some kind of doubt up to that point in time, it would rapidly vanish when he responded on June 3 in writing. He, first of all, gave an elaborate explanation of why Mr. Kunkel's accident log wasn't produced and then followed by saying that plaintiff further complains that Al Svede has not produced "his own"—those are Mr. Means' words—relating to the same topic; that is, the subject of accidents.

He goes on to certify and represent to the court in a document signed by him that defendant has certified, based on the answer provided by Al Svede—this is referring to Al [75] Svede's own log, according to Mr. Means—defendant has certified, based on the answer provided by Al Svede, that there is no record of any complaint of the type sought by plaintiffs' request.

That couldn't be a more direct statement to me and to opposing counsel that inquiry has been made of Al Svede about his own log, as opposed to Mr. Kunkel's log, which

was discussed in the preceding paragraph, and that that inquiry resulted in a response by Mr. Svede that there is no record of any complaint in that log.

Then at the June 4 hearing, the discussion on page 45 of the transcript, Ms. Robbins says, "Mr. Svede testified that he had an accident log that he kept, and also the Fort Worth facility maintains an accident log."

Then there was some discussion there about the two different accident logs.

Then I asked Mr. Means the question, "Why haven't those accident logs been produced?" That referred to what had previously been identified on the record as Mr. Svede's and Mr. Kunkel's.

Mr. Means says, "A search has been conducted of those accident logs, as we have set out in our response to this supplemental motion"—again, referring me back to his reference to Mr. Kunkel's log and Mr. Svede's own logs—"as we have set out in our response to this supplemental motion, [76] and there is no record in those logs relating to any accident or complaint on the premises of River Bend."

There couldn't have been a more blatant representation to the court that neither log, Mr. Svede's log or Mr. Kunkel's log, had any reference to any accident on the premises of River Bend.

And then the same thing happened throughout, the references to these logs and the fact that none of the logs show any reference to the accident at River Bend.

I think I have already mentioned the statement he made, "I am stating under oath before the court as an officer of the court that my representations in that motion"—obviously referring to this response where he said that Al Svede's own log didn't contain any reference to the accident—"that a search of the log has been concluded and no accident has been identified," so on.

Those are the only conclusions I can reach from what I have heard, either that he just is absolutely totally incompetent or he has made some of the most serious mis-

representations a lawyer can make to a court, representing under his oath, as his words, something that is false.

Now, you are saying he didn't know it was false. He used awful strong language, if he didn't know it was false. So maybe that falls in the first category.

So I've got a hard decision as to where I go from here. I [77] don't want to embarrass the U.S. Attorney's Office.

Mr. Collins, you have sat through this hearing, and you have heard what has happened. I would like any comments you have to make.

MR. COLLINS: May it please the court.

THE COURT: Yes.

MR. COLLINS: Your Honor, I appreciate the opportunity to make comments on a matter of serious concern to the court. And with the court's permission, I would like to offer first a couple of general comments about the U.S. Attorney's Office and the practice in the U.S. Attorney's Office and then some specific comments with regard to this.

THE COURT: Okay.

MR. COLLINS: First, generally, I'm very concerned —regardless of what may be the root cause in this case— I'm very concerned that we have had a discovery matter like this go this far and the documents not produced as requested and ordered.

So on Friday I did issue a memo to all the assistants, criminal and civil, to exercise extreme care and diligence in their document production and in discovery, both criminal and civil cases, and to also pay close attention to what is requested of and represented by various agencies. As you know, we deal with a lot of agencies.

I'm very concerned, regardless of the extent to which [78] discovery requests and orders by the court went in this case, the documents were not produced until the 11th hour. And I think that is something that we certainly do not wish to have and—

THE COURT: And let me interrupt you. And I appreciate the sentiments you are expressing. But I think

you also realize they never would have been produced, had I not, on my own, ordered the witness to come to the courthouse and ordered that he bring the documents with him.

MR. COLLINS: I do.

THE COURT: In other words, this case would have been tried.

MR. COLLINS: I do understand that, Your Honor.

And that's inexcusable. I don't offer any excuse for that for the office, except to say that I certainly intend that it not ever happen again.

And, in addition to that memo, I'm going to instruct all of my supervisors, criminal and civil, to raise the level of sensitivity of all Assistant U.S. Attorneys to discovery matters such as this.

I think sometimes we do not exercise the care that we should in dealing with the myriad of other agencies we deal with. And sometimes, while we may understand it, we do not communicate the understanding of how vital it is to the agencies we deal with that everything be produced for our [79] inspection so we can decide if it does or does not need to be produced under discovery.

And certainly it is the intent of this U.S. Attorney and this U.S. Attorney's office that something like this absolutely not occur again.

With regard to the specific allegations in this case, first I want to say that whatever strong points or weak points that Mr. Means may have as an attorney, I personally have never had any occasion to question either his diligence or his honesty.

During a brief period of time in 1981 and '82 I was a criminal district judge at the state, and during that time Mr. Means was a prosecutor assigned to my court on a daily basis. And during that period of time I did not have any reason to question either his diligence or—

THE COURT: I guess that was one of the questions I had.

Since he has been an Assistant United States Attorney, has there been any question raised by anybody concerning his conduct from an integrity or ethical standpoint?

MR. COLLINS: Not from an integrity or ethical standpoint, Your Honor.

At one point I had what I considered a serious in-house problem with Mr. Means' inability to get along with his supervisor in the criminal section.

THE COURT: I am not interested in that.

[80] MR. COLLINS: And that was all taken care of, but that absolutely did not involve his competence or diligence.

THE COURT: Well, I am not interested in that sort of thing.

MR. COLLINS: Right.

And I will say, during the time particularly that he was in the criminal section from 1987 until November of 1990 in this office, I didn't get anything but high marks from the courts before whom he practiced as a criminal prosecutor.

I do have very serious concerns with regard to this court's confidence or lack of confidence in any assistant. I'm absolutely convinced before you made your remarks that this court at this point in time does not have that confidence in Mr. Means, and I instructed his supervisor to re-assign Mr. Means from all cases in this court. And we will not assign him to any cases in this court, unless and until we receive permission from the court and the court is of the opinion that this is something we can do.

THE COURT: Well, let me say this on that subject: As long as a lawyer is a member of the bar of this court, I would never suggest that he should not be permitted to practice before me, because the mere fact that I have had an unpleasant experience with a lawyer at some point in time is not going to change my reaction to his client's situation in a lawsuit or my evaluation of the outcome that a lawsuit should have.

[81] MR. COLLINS: I understand that fully, Your Honor.

And this decision was reached by me basically because I feel like there is a crisis of confidence, so to speak, that

the court has with regard to Mr. Means and his conduct in this matter. And it's my desire, as United States Attorney, to make sure that when a representative of the U.S. Attorney's Office comes into this court that there not be such a crisis of confidence.

THE COURT: Okay. Well, that is your business. But my thought is that is not necessary, assuming he continues to be authorized to practice before the court.

MR. COLLINS: Certainly.

And, secondly, Your Honor, I do think it is appropriate that Mr. Means be given further training. We do have training available at the Department of Justice. It is excellent training. Frankly, it is more difficult to get an attorney with his years of experienec into those courses, but I will personally see to it that the next available civil trial advocacy course is taken.

I don't think that solves all the court's problems in this regard. I simply want the court to know that we are not going to turn our back on something of this matter and not take further steps.

And, of course, finally, I will make sure that his supervisor, Mr. Brown, who is here in court today, would [82] closely monitor and supervise his conduct.

In closing, I am not sure it is appropriate for me, as United States Attorney, to offer any of my own personal conclusions in this matter, except to say that I felt like when I was listening to Mr. Svede and Mr. Means that they were both expressing what occurred in the case. I don't offer that as an excuse.

I think it is inexcusable that we have reached this point and that the right questions were not asked appropriately in order to get these documents produced. And I would assure the court that, if the court gives us the opportunity to do so with Mr. Means, we'll take all necessary steps to see that it does not happen again.

THE COURT: Okay. Thank you very much.

MR. COLLINS: Thank you.

THE COURT: I see that you are making some notes. Did you have something that you had proposed to say?

I will give you an opportunity to say something, if you do.

MS. ROBBINS: It's kind of awkward for me to express an opinion about this because it is—

THE COURT: Well, you are not obligated to express any opinion, if you don't want to. I'm just—I have invited you to participate. I thought your prior history in the case could be beneficial. I will give you an opportunity to say something.

[83] MS. ROBBINS: There is one matter, a fact matter, as far as when his knowledge of the existence of the second log came about and the fact that there was an entry in Mr. Svede's log, at the time we were having the afternoon session of the June 4th hearing. And I believe the testimony earlier was that he had learned about the existence of that or the entry in the log after having looked at it—or maybe it was the first log he was referring to—an hour-and-a-half before the hearing or at the noon hour.

My client informed me that Mr. Svede, when he first got on the stand and you asked him—

MR. KERR: Your Honor, I'm sorry. This is not a statement; it is hearsay testimony.

THE COURT: Well, this is a hearing to determine whether there will be another hearing. And if she has information she can relate to me about what might be developed in another hearing, I would like to hear about it.

Go ahead.

MS. ROBBINS: I was questioning the witness at the time and looking at him, and I believe you had asked him the question about is there any notation about Ms. Chilcutt's accident in your log. And I believe the testimony was that Mr. Means had found out about that earlier.

And I am confused because my client informed me that, in her words, he nearly fell out of his seat when Mr. Svede [84] admitted that there was a notation in that

log. And I was clearly shocked by it because I had thought that there was Mr. Svede's log all along.

And so I am kind of confused about that, and I am not sure that the testimony that we have heard corresponds with the reaction of Mr. Means at that revelation.

And that's all I have to add, Your Honor.

THE COURT: Okay. Thank you.

Well, something else that I think would be appropriate for me to mention in the record, of course, I think Mr. Svede is basically being honest. But I think he might be —and, frankly, I am taking his testimony with a little bit of a grain of salt because of the unlikelihood that he would remember the details of the things that were said between him and Mr. Means back at that time. I think it more likely that Mr. Means was telling it the way it was when he referred in the documents that we have talked about to Mr. Svede's own log, and that Mr. Means knew Mr. Svede had a log.

And I think it likely, almost a certainty, that Mr. Means was representing to the court intentionally that Mr. Svede's own log didn't report the accident in question.

And, of course, that raises the possibility or the prospect that the reason Mr. Svede's log was concealed is that it disclosed other accidents that occurred in a close proximity from a time standpoint.

[85] So the question I have to answer now is where do we go from here?

Mr. Means, do you want to make any comments on your own behalf?

MR. MEANS: Yes, sir.

THE COURT: You do?

MR. MEANS: Yes, Your Honor.

THE COURT: Okay. Go ahead.

MR. MEANS: If the court has reached the conclusion that I saw that document, was scared of it for some reason in this lawsuit, and intentionally hid it or took action to hide it or prevent its disclosure, I'm sorry, but the court is wrong. I did not do that.

When I stand in front of the court and make a statement that, as an officer of the court under oath, I'm stating a particular fact, I was honestly telling the court the truth as I knew it. And I don't know any other way to say that, Your Honor.

The court's conclusion that when I was referring to Svede's log in the responses and during that hearing, as I have listened to what the court has said, it seems to me the court is of the conclusion that I was trying to refer to both logs and cover both logs (meaning the Svede log and the Kunkel log) when I was referring to the fact that the logs have been searched and that no entry was found, and that, therefore, I [86] must clearly have been hiding the fact of the Chilcutt entry in the Svede log.

That conclusion is not correct, and I can do nothing except respectfully disagree with the court's conclusion or speculation on that point.

My references to the logs being searched has always been, and specifically was, to the searching that had been done of the logs that we have come to describe as being those in the Kunkel office or the Safety Office.

And I did not ever understand or see or know of the existence of this separate Svede log until it was brought to my office and we had it before that hearing that afternoon. And I can do nothing more other than tell the court that is my truth. I stand by that, and I have no choice but to face whatever judgment the court wants to make in light of that.

THE COURT: Well, Mr. Means, let me ask you this: Why were you referring to Mr. Svede's "own log"?

Well, I think I went over that with you while you were on the stand.

To me, that's inexplicable. But you have given me your explanation.

MR. MEANS: Well, not to repeat, but my reference, Your Honor, is to the allegation in the plaintiffs' position about his having a log. And the response I make is refering to the certification, which is where Svede has told me

the logs [87] have been searched and that we're responding. And I am talking about the one package of logs in response to both issues. We have searched the logs, and that's our response to both issues.

And simply in describing the Kunkel search, I went through all the detail about the Kunkel search and was referring to the overall search in my second reference in talking about his allegation, or her allegation about his log.

THE COURT: Okay. Thank you.

Let me ask you this, Mr. Kerr: If I decide that the thing I should do is something less than criminal contempt, does your client want another hearing?

MR. KERR: Your Honor, I would like the opportunity to discuss that with Mr. Means.

THE COURT: Well, visit with him a minute because it would occur to me that everything to be presented has been presented here.

MR. KERR: I think that's correct, Your Honor.

THE COURT: Confer with your client a minute.

MR. KERR: May we step out?

THE COURT: Why don't we take about a 10-minute recess?

MR. KERR: All right.

(Recess was taken.)

THE COURT: Okay, Mr. Kerr.

MR. KERR: Your Honor, if I understood the court's [88] question correctly, we'll not ask for an additional hearing on these matters, should the court decide not to pursue a show-cause hearing for criminal contempt.

Does that answer the court's question?

THE COURT: That's my question.

Okay. I have decided I'm not going to pursue the matter of criminal contempt further. I think that this is a case where a court could find beyond a reasonable doubt the elements of criminal contempt, but I guess, in a sense, I am giving Mr. Means the benefit of the doubt and simply am not going to pursue that.

I'm also taking into account in deciding what I am going to do Mr. Collins' assurance relative to the matters that he gave the assurance with reference to, except that I am not asking for assurance from Mr. Collins that Mr. Means won't appear before me again. That will be a matter that Mr. Collins will have to decide. Implied in what I have just said is the conclusion that, again, I am going to give Mr. Means the benefit of the doubt and I am not going to bar him from practicing before the Northern District or before me.

I am ordering that the record of this hearing be included in any appellate record in this case, if there is an appeal. I'm ordering that the record pertaining to the matters that have been dealt with so far be unsealed, to the extent we have sealed orders or any other sealed matters in this case.

[89] I'm ordering that, in addition to whatever training the office of the United States Attorney causes Mr. Means to have, that Mr. Means attend, at his own expense and not at the expense of the government—and I expect him not to be reimbursed by the government—15 hours of continuing legal education or another course provided by an accredited institution of training in ethics or professional responsibility or whatever the course might be called.

And in the written order that I make I will require that there be a verification by affidavit at some point in time that that has occurred, and I expect it to occur no later than November 1, 1992; that is, the attendance at the continuing legal education or other accredited course on ethics and professional responsibility. And the reporting to the court by affidavit that that has occurred will be on or before that date.

I consider that Mr. Means is somewhat on probation in the sense that I can—I will consider that I can take into account things that have already occurred in deciding on any future action I take in reference to Mr. Means, if there in the future arises an occasion for me to take action in reference to Mr. Means.

I'm ordering that Mr. Means reimburse Ms. Robbins or pay Ms. Robbins an amount that would be a reasonable fee for the time she's devoted to preparation for this hearing and [90] attending this hearing. I wouldn't anticipate there would be significant time devoted to preparation, but she has been in attendance. That's been pursuant to my order. And I think that I would consider that her attendance was appropriate under the circumstances and that it's something she didn't bring about on her own, but, rather, it was brought by the conduct of Mr. Means.

So I might ask now—We might fix an amount now.

Ms. Robbins, how much time have you devoted to this, the matter of this hearing, and the events leading up to it? And include the amount of time it will take you to get back to your office. If you can give me a number now, it might help.

MS. ROBBINS: Four hours today, including travel. I was here at 8:00 o'clock.

I'm sorry. I left my office at 8:00 o'clock. I was here at 8:30, and then I spent an hour prior to that just reviewing the documents.

THE COURT: Okay. A total of 5 hours.

I am going to conclude that $150 an hour—I don't recall. What was the per-hour rate we used before, Ms. Robbins, if you recall?

MS. ROBBINS: You had decided 125.

THE COURT: Okay. I will use the same per-hour rate.

So the reimbursement will be $625, and I will expect Mr. Means to make that payment to Ms. Robbins within 30 days from [91] today. I expect that payment to be made out of Mr. Means' funds and Mr. Means not to seek any reimbursement from the government with respect to that payment.

And I reserve the option to require a verification on those subjects by affidavit from Mr. Means.

Okay. Those are the only orders I'm going to make.

And I will say to Mr. Means that I think you probably deserve more, but I am giving you the benefit of the doubt.

And I appreciate the attitude Mr. Collins and his office has had on the subject.

You are excused.

U.S. POSTAL SERVICE

NON-VEHICLE ACCIDENT REGISTER

CCIDENT DATE (3)	CASE NO (4)	NAME OF INJURED PARTY OR OWNER OF DAMAGED PROPERTY (5)	ADDRESS OF INJURED PERSON OR PROPERTY OWNER (6)	ACCIDENT LOCATION (7)	NAME OF POSTAL EMPLOY
12-88	9-1A	ORBRA DILLION	4501 RIDGE NORTH	4501 RIDGE NORTH	KEVIN T PA
4-88	9-2A	BRENDA CHILCETT	108 CURTIS DRIVE WEATHERFORD TX	RIVERBEND P.O. LOBBY	N/A
6-88	9-3A	LUCILLE GIBBS	5033 COTTEY ST.	POLY STA. P.O.	N/A
21-88	9-4A	GLENDA WILLIAMS	3505 BRAMBLETON	GLENCREST STA	MARSHALL HENDR
27-88	9-5A	SUSAN MORGAN	1305 PLANTATION DR. NORTH	GRAB 7800 BEDFORD-EULESS RD	PATRICK JONES
21-88	9-6A	TERESSA PIKE	3725 CENTURY PLACE #302	W. WOOD STA PARKING LOT	N/A
27-88	9-7A	TAMARA ISBEL	7405 TALLOW WIND #A	W/WOOD P.O.	N/A
7-88	9-8A	MORGAN, MICHAEL	4000 ALLENDALE	GRAB PO	N/A
5-89	9-9A	GENE BLESSING	P.O. BOX 40495	BMAH GMF FT WORTH	N/A
1-89	9-10A	CLIFTON DAVER	3828 HARDEMAN	POLY STATION	N/A
1-89	9-11A	CHARLES DAVIS	7433 DENVER	GRAB STATION	N/A
1-89	9-12A	DOROTHY MCMAHEL	1942 FAIRMONT	DOWNTOWN STATION	N/A
1-89	9-13A	ERIN McKINNEY	8604 CRESTVIEW	GMF BMAH	N/A

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120 a

APPENDIX J

(1) POST OFFICE: FORT WORTH, TX 76161-9998

(2) FISCAL YEAR: 1989

VOLVED	DESCRIPTION OF INJURY OR PROPERTY DAMAGE (9)	DATE TORT CLAIM RECEIVED (10)	AMOUNT PRIVATE PARTY CLAIMED (11)	DATE FORM 2198 FORWARDED (12)	FORM 2198 FORWARDED TO (13)	DATE TORT CLAIM ADJUDICATED (14)	AMOUNT PAID (15)	INVESTIGATOR'S INITIALS (16)	REMARKS (17)
	MULTIPLE BITE	10-14-88	$425.00	10-24-88	D/F		$350.00	AS	
	INJURED NECK	4-17-91	550,000.00	suit	Filed	Fed Ct.		AS	PATRON FELL IN LOBBY OF RIVERSIDE P.O.
	INJURED BACK + NECK	11-17-88	$5,000.00	11-30-88	INSP	1-18-89	-0-	MS	PATRON ALLEGES FALL IN LOBBY OF POLY STA.
ON	" "	8-17-89	$75,000.00	8-18-89	INSP			D/F	PATRON FELL IN LOBBY OF SUNDANCE STA
	CUT ON HAND	2-1-89	$5,065.00	2-1-89	INSP				SCRAPPER FELL FROM WINDOW SILL, CUT PATRON'S HAND.
	CUT ON HEAD	1-5-88	$54.95	1-6-89	INSP			CG	YOUNG LADY WALKED UP TO DROP BOXES, TRIPPED ON LUGS, STRUCK HEAD ON BOXES
	DISLOCATED KNEES	2-22-90	$60,300.-	2-27-90	FIELD LEGAL SERV.			RP - GR	PATRON SLIPPED ON RAIN SLICK LOBBY FLOOR
	FELL IN LOBBY INJU B							WD	
	BROKE TOE							AS	
	SCR: FROM FALL							DH	
	NECK FELL PARKING	6-21-89	$200,000.-	6-28-89	INSP			AS	ALLEGES FALL IN PARKING LOT
	FELL DOWN STEPS							BJ	PATRON FELL DOWN STEPS /SMD SHE MISSED THE LAST STEP / PD CALL AMBULANCE
	INJURED IN							WP	PATRON INJURED WHILE LOADING MAIL IN APC, CRMA

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APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1668

BRENDA CHILCUTT, *et al.*,
Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendant-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas

PETITION FOR REHEARING

The Department of Justice views with the utmost concern any failures of its attorneys to conduct litigation in accordance with high professional standards. In our submissions to this Court, we have acknowledged the substantial shortcomings in the conduct of this case in the court below. While we have argued that those shortcomings did not warrant the severe sanctions that the district court imposed, we have not asked the Court to condone the government's admitted failure to comply with discovery requests in a timely and complete manner.

Nevertheless, we are very much concerned that this Court has seriously misapprehended some of the pivotal

facts of this case. We must, of course, accept a large degree of the responsibility for such misapprehensions, for we doubtless failed to convey with adequate clarity certain key aspects of the record below. Regardless of the causes, however, we submit with the greatest respect that the Court's opinion contains manifest factual errors that are plainly contradicted by the record below. For example, the Court states that the government withheld a document that contained information about additional accidents (apart from plaintiff's) at the same Postal facility. *See* slip op. at 531 & n.21. In fact, inspection of the document in question reveals that it contains *no* such information. *See* E.R. 63-66. The Court also states that trial counsel "blatantly" misrepresented the content of an accident log to the district court, on the theory that he claimed to have reviewed that document and to have determined that it did not contain information about plaintiff's own accident. *See* slip op. at 526-27. The record below, however, shows that counsel's statements referred to a *different* set of logs, which in fact contained no entry regarding plaintiff's accident, and that he learned of the existence of the second set of logs only moments before it was presented during the hearing on June 4, 1992.

These factual errors are of great importance in this case, we submit, because they appear to lie at the heart of a distinction we have stressed—*i.e.*, that between carelessness and dishonesty. We recognize, of course, that this distinction may not be dispositive by itself, for substantial sanctions may be appropriate even where errors are not intentional. *See* slip op. at 532 & n.23. Nor do we mean to excuse carelessness in the conduct of civil litigation, for we recognize that it may be equally disruptive of the judicial process, and cannot be condoned. Nevertheless, there can be no doubt this disinction is of great importance in the present case—not only because it is a pertinent factor under the law of discovery sanctions, but also because of the manner in which the public

record of this case will reflect on the character of the inviduals involved.

A number of the factual statements contained in this Court's opinion also go beyond the pertinent findings made by the district court itself. The district court made emphatically clear its condemnation of the handling of this case by government counsel. Yet, when all was said and done, it acknowledged some uncertainty as to whether the missteps reflected lapses in honesty or competence, and stopped short of entering findings establishing misrepresentation or other intentional malfeasance. The district court specifically and repeatedly gave counsel the "benefit of the doubt" in declining to impose criminal contempt. *See* July 28, 1992, Tr. at 76, 88, 91. In contrast, this Court's opinion appears to take it as conclusively established that counsel made purposeful misrepresentations to the court below concerning the existence and content of documentary evidence. For the reasons presented below, we respectfully submit that this conclusion is in error, as are certain other factual recitations in the Court's opinion that go beyond the facts as expressly found by the district court.

In light of the seriousness of the misconduct charged in this case, appellants earnestly request that Court carefully reexamine the record evidence regarding these issues. We respectfully submit that such a reexamination will confirm that, despite the acknowledged lapses in the government's actions below, the record does not support a conclusion that those lapses included "blatant misrepresentations," or the intentional withholding of documents. *See* slip op. at 532. Moreover, regardless of whether such a reconsideration alters the ultimate disposition of this case, we request that the Court consider the amendment of its published opinion, to ensure that it reflects a fair and balanced view of the facts.[1]

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[1] Because we address principally factual issues, we are submitting only this Petition for Rehearing, and have chosen not to burden the entire Court with a Suggestion of Rehearing *En Banc*.

1. Much of the attention in this case has focused on an accident log, maintained by Al Svede of the Postal Service, which was not produced in discovery but which came to light at the hearing of June 4, 1992. We do not deny that this log was called for by the discovery requests and should have been produced. We do, however, submit that the evidence presented in the court below—including the uncontradicted testimony of Mr. Means and Mr. Svede—confirms that Mr. Means did *not* know of its existence at the time that he made the statements that this Court has condemned as "blatant misrepresentation[s]." *See* slip op. at 531. As demonstrated below, counsel's previous statements regarding the set of logs that he had seen—*i.e.*, the statements that prompted this Court to state he had to have seen the crucial log (slip. op. at 528)—actually referred to an entirely different document, a second set of logs, maintained by different Postal Service personnel.

In approaching this issue, the Court has recognized that the content of the document is a key starting point. Withholding such a document could only make sense—even assuming the very worst motives on the part of a government counsel—if it contained information that would be helpful to the plaintiff's case. *See* slip op. at 531 n.21. Unfortunately, the Court appears to be laboring under some misimpressions about the content of the document in question. The Court states, for example, that "the concealed log proved that numerous other customers had likewise fallen at the River Bend Post Office." Slip op. at 531. The Court also states that "[t]his log apparently contained information about remedial actions taken by USPS in response to Ms. Wortham's accident, as well as information on other accidents which occurred at the River Bend location." *Id.* at 525 n.6.

The document in question, however, does not in fact contain any information of the sort referred to. The "withheld" log, which is the one that came to light at

the June 4 hearing, is the one of which we provided a copy at pages 63-66 of the Excerpts of Record. As the Court will see upon reviewing that document, plaintiff's accident is the *only* one listed that took place at the River Bend Post Office. The information provided about plaintiff's accident, moreover, is very limited, and includes no previously undisclosed information. In addition, this log provides *no* information about remedial steps taken in response to any of the incidents listed.

When the district court considered this point, it nevertheless concluded that the log might be useful to plaintiff by leading her to further inquiries regarding maintenance practices of the Postal Service. *See* June 4, 1992, Tr. at 107-08. We acknowledge that the log could have some potential value of this sort, but we submit that any such value is highly attenuated. It is wholly implausible, we submit, that counsel would take the risks inherent in willfully withholding relevant discovery materials merely to keep a document of such limited usefulness out of the hands of plaintiff.[2]

In this regard, we would also like to disabuse the Court of another misimpression under which it appears to have been proceeding. The Court has stated that "the same contractor cleaned all of the post offices in the Fort Worth area * * *." Slip op. at 525 n.5. If this were true, it might tend to enhance the pertinence of the second log. However, the district court made no such finding, and indeed there is no evidence in the record that would bear out such a finding. On the contrary, had this issue been raised in the court below, the government could have adduced evidence clearly showing that the contractor in question cleaned only a limited number of postal facilities, and indeed that the facilities that she cleaned ac-

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[2] Moreover, as discussed below, the record shows that government counsel in any event did not know about the existence of this second log, at the time he explained to the district court that the log that he had reviewed contained no relevant information.

counted for *none* of the accident entries on the "concealed" log, apart from plaintiff's own accident.[3]

Thus, the accident log principally at issue contained no information significantly damaging to the government's case, but on the contrary was quite routine. We submit that it is not plausible that, even assuming he were otherwise dishonest, counsel would resort to dishonest acts—either intentional withholding or lying about its content—simply to keep such innocuous information from coming to light. The document itself—which contains no new information about plaintiff's accident, nor any information at all about other accidents at that location or at other facilities cleaned by the same contractor—undermines any presupposition of bad motive. It is equally implausible that the parties would initially contrive to hide such a document, only to produce it for the court's examination at a later point. Such action demonstrates that confusion, as opposed to willfulness, prevented its earlier discovery.

2. It also appears that we may have failed to make clear to the Court one of our key arguments regarding the causes of the difficulties in the court below—the fact that there were *two* sets of logs, one of which—the second, supposedly "concealed" log—was unknown to government counsel until the June 4 hearing. At some junctures of this Court's opinion, the Court appears to be proceeding upon the understanding that Mr. Means made express statements that the second "Svede" log itself did not contain information regarding plaintiff's accident. *See* slip op. at 533 ("Mr. Means stated as an officer on the court that he had reviewed Mr. Svede's log and had determined that it was not responsive to the plain-

[3] These facts are reflected in the deposition testimony of Marilyn Chapman, the cleaning contractor, which was taken in this case on May 28, 1992. Although that deposition was not made part of the record in the court below, we would be happy to provide a copy to this Court, should it wish to confirm our representations.

tiffs' requests for production"); *id.* at 527 (reciting that the Svede log "did, indeed, list Ms. Wortham's accident, contrary to Mr. Means' earlier statement that *it* did not" (emphasis added)).

The record reflects, however, that Mr. Means made no such express statements. On the contrary, Mr. Means referred, in the district court colloquy upon which this Court has focused, only to a set of "logs" of which he was aware, saying that it did not contain any entry of plaintiff's accident or of any other accident at the River Bend Post Office, and was therefore not called for under plaintiff's document request. *See* slip op at 526-27 n.12 (quoting June 4 Tr.). In particular, Mr. Means' statement, "as an officer of the court," was that "a search of *that log* has been conducted, and no accident has been identified to the time period *in that log.*" *Id.* (quoting June 4 Tr. at 50) (emphasis added). As is confirmed by later testimony, these statements were *not* references to the Svede log (of which Mr. Means was unaware at that time), but were references to the only log known to him at that time, the separate one maintained by Postal Service employee Robert Kunkel, of the Safety Office. *See* July 28, 1992, Tr. at 15-17, 31-32, 40-41, 46-47. The record is undisputed, moreover, that the Kunkel Safety Office log in fact did *not* contain any entry regarding plaintiff's accident. *Id.* at 31-32. Accordingly, Mr. Means' statements to the district court about the content of the "logs" were truthful,[4] to the best of his knowledge, because he did not know about the existence of the second set of logs until Mr. Svede produced them immediately prior to the afternoon session of the June 4 hearing, and because Mr. Svede had

[4] The mere facts that Mr. Means referred to "logs" by no means implies that he was referring to *both sets* of logs. A single set of "logs" is often referred to in this manner in common parlance, and indeed the Kunkel/Safety Office "logs" were referred to in this manner elsewhere in the proceedings below. *See, e.g.*, July 28 Tr. at 16-17, 48-50.

previously told him that there were no references to the subject accident in any other documents kept by the Postal Service. *See* July 28 Tr. 17-18, 24-25, 38-39, 51.[5]

By urging the Court to reconsider the evidence on this point, we by no means seek to excuse the non-production of the second log. There is no question that it was called for and should have been produced in a timely manner. We recognize, moreover, the inescapable conclusion that there was fault in not locating and producing this document. Had Mr. Means and Mr. Svede both taken proper care in carrying out their discovery obligations, the second log should have been produced. We respectfully submit, however, that the weight of evidence is strongly against any conclusion that Mr. Means engaged in the sort of "intentional[] withholding [of] documents" or "blatant misrepresentations to the district court" that this Court's opinion takes as established. *See, e.g.*, slip op. at 532.

3. Another document that has been the source of dispute is an accident report form, Postal Service Form 1769, that plaintiff claims to have filled out. The record before the district court as to whether or not such a docu-

[5] In its evaluation of this point, the district court also made reference to the government's earlier written response to plaintiff's motion for sanctions, in which the government had referred to Mr. Svede's "own log." *See* July 28 Tr. at 74-75, 86-87; *see also* slip op. at 526 & n.11. The use of such language did not imply, however, that government counsel knew of the Svede log at that time. On the contrary, Mr. Means explained in the court below that the quoted language was used as a direct response to (and paraphrase of) plaintiff's objections, which Mr. Means believed to be in error. *See* July 28 Tr. at 57-60. Indeed, a fair reading of the pertinent portions of the government's written response is entirely consistent with Mr. Means' explanation to the court—*i.e.*, that he had carefully inspected the Kunkel/Safety office log and found them void of relevant accident reports and thus not to be responsive to plaintiff's request, but that he was unaware of the existence of the separate Svede log. *See* Defendant's Response: Plaintiff's Supplemental Motion for Sanctions, June 3, 1992, at 10-13, 23-24, R. 332-35, 345-46.

ment existed was admittedly in dispute. However, the district court made no express findings of fact on this point, nor did it place any specific reliance on this point in drawing its ultimate conclusions and imposing sanctions. *See* June 4 Tr. at 144-53.

In its discussion of this issue, this Court appears to be of the view that the existence of this document was established beyond question. With respect, we submit that the record does not bear out such a conclusion. We recognize that plaintiff herself testified that she filled out such a form and returned it to Postal Service employee Iona Smith. June 4 Tr. at 112. Ms. Smith, however, denied any knowledge of plaintiff's having done so. *Id.* at 85-86. Mr. Svede *initially* testified (as this Court has noted) that he had a copy of this form. *See* slip op. at 527; June 4 Tr. at 93. Shortly thereafter, however, Mr. Svede indicated that, although he thought that he had seen such a form, he was in fact unsure about this and could not now produce it. *Id.* at 100.

The record thus leaves questions unanswered, and Mr. Svede's testimony is, on its face, puzzling. Witnesses do, however, at times become confused, and the district court is best positioned to evaluate such matters, since it can observe the demeanor of witnesses. *See National Surety Corp.* v. *Musgrove*, 310 F.2d 256, 262 (5th Cir. 1962) ("This Court cannot, however, review the evidence and make findings de novo, especially in a case such as this one in which much depends upon the demeanor of the witnesses"), *cert. denied*, 375 U.S. 974 (1964); *see also United States* v. *Best*, 939 F.2d 425, 431-32 & n.3 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992). Despite the district court's other criticisms of government counsel, it made no specific findings on this point. We submit that the highly equivocal record on this point [6] provides no support for any conclusion that coun-

[6] Apart from Mr. Svede's apparent confusion, there remains the apparent dispute between plaintiff's testimony and that of the

sel engaged in willful or contumacious behavior. Indeed, there is absolutely no implication in the record that Mr. Means had even seen or possessed such a document, nor misrepresented any fact about such a form.

4. In short, despite the acknowledged, serious lapses in the government's response to plaintiff's discovery requests, we respectfully urge the Court to reconsider whether the record truly compels a conclusion that those lapses were "patently willful and contumacious." *See* slip op. at 532. When one considers the fact that there were two sets of logs (one of which unquestionably contained no information relevant to plaintiff's discovery requests), the nonprobative nature of the second log found to have been "withheld" (*see* E.R. 63-66), and the ambiguous record regarding the existence of any accident report form filled out by plaintiff, it becomes apparent that there is another plausible explanation for the events at issue—in our view, a far *more* plausible explanation. That is that there was a failure to respond timely to discovery, an inadequately thorough search for documents, and then a good deal of confusion and carelessness, which prevented the trial counsel from learning of the document earlier.

As we have stated previously, we do not seek to excuse such carelessness or ask the Court to condone it. We submit that there is legitimate question, however, as to whether such errors of carelessness should lead to the rather severe

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Postal Service employee. There are, however, at least two possible explanations for this. One is that plaintiff was mistaken in her recollection of having filled out such a form. Another is that she did so, but that the Postal Service lost the form at some time between receiving it in 1988 and searching its files in response to the discovery request in 1992. Regardless of which of these possibilities in fact represents the truth (an issue that the district court did not resolve), *either* possibility belies the notion that the government (particularly government counsel) has willfully withheld a document in its possession, which we continue to insist is not the case.

sanctions imposed here.[7] Moreover, even if the Court should determine that the sanctions imposed are to be affirmed regardles of whether the misconduct was the result of carelessness or dishonesty, we respectfully ask the Court to amend its opinion in light of the significant considerations discussed above. As the Ninth Circuit has observed, "published opinions chastising [counsel] by name" constitute a "serious sanction." *See United States* v. *Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993). We therefore respectfully submit that, even if the Court is disinclined to alter its affirmance of the sanctions ordered by the District Court, it should correct the factual errors in its opinion, in accordance with the presentation made above.

5. Finally, we request that the court alter the portion of its opinion taxing attorney's fees against the government for the present appeal. *See* slip op. at 538. Although the Court did not specify the exact basis for this award, we assume that it was made pursuant to 28 U.S.C. § 2412(b), in conjunction with Fed. R. App. P. 38 and/or 28 U.S.C. § 1912.[8] We recognize that attorney's fees

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[7] The Court is quite right that the sanctions order left the United States free to pursue affirmative defenses and to contest the amount of damages, and we have never intended to convey a contrary impression. *See* slip op. at 529. Under the actual circumstances of this case, however—where we had little to offer by way of affirmative defenses; where it was unquestioned that plaintiff's fall resulted in substantial harm to her; but where we believed that any evidence of negligence by the Postal Service was quite weak—the *real* effect of the order was to deprive the government of its only realistic chance for a favorable outcome in this litigation—namely, the requirement that plaintiff prove liability.

[8] The more frequently invoked portion of the Equal Access to Justice Act, 28 U.S.C. § 2412(d), expressly excludes "cases sounding in tort" from its authorization of fee awards. 28 U.S.C. § 2412(d)(1)(A). This limitation doubtless reflects the fact that counsel for plaintiffs in tort cases generally receive ample compensation from contingency fee arrangements—particularly where, as here, the judgment won is substantial.

may at times be a proper element of "damages" under the latter two provisions, but only where the appeal was *frivolous*. *See Self* v. *Self*, 614 F.2d 1026, 1028 (5th Cir. 1980); 9 *Moore's Federal Practice* ¶ 238.02[1] (1993). For all of the reasons set forth above, we submit that the present appeal was not frivolous, and that there should be no separate award of fees to plaintiffs for defending it.[9]

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[9] The Federal Tort Claims Act, under which the present action was brought, imposes mandatory limitations on the percentage of the judgment rendered that counsel may collect in fees. 28 U.S.C. § 2678. Even if the Court determines, contrary to our arguments, that an award of fees on appeal is appropriate, it may wish to clarify that the total amount of fees received by counsel may nevertheless not exceed the amount permitted under this provision.

CONCLUSION

For the foregoing reasons, appellants respectfully urge the Court to reconsider its ruling in this case, reverse the sanction imposed upon the United States, and remand for trial on the issue of liability. In the alternative, appellants ask the Court to amend its opinion, in light of the lack of evidence in the record of willful or contumacious misconduct. We also request deletion of the portion of the Court's opinion awarding attorney's fees on appeal.

Respectfully submitted,

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